Supreme Court of the United States

OCTOBER TERM, ~~1964~~ 1965

No. ~~172~~ 2

UNITED STATES, PETITIONER

vs.

FRANK ROMANO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 28227

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO, ANTONIO VELLUCCI, DEFENDANTS-APPELLANTS

On Appeal From The United States District Court For The District Of Connecticut

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APPENDIX FOR THE DEFENDANDTS—APPELLANTS —filed September 16, 1963

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[File Endorsement Omitted]

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[fol. 30]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 10284

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* * * *

(Title 18 U.S.C., Section 371, Title 26, U.S.C., Sections 5601(a)(1), 5601(a)(8)

INDICTMENT—filed December 1, 1960

The Grand Jury Charges:

COUNT ONE

On divers dates between September 1, 1960 to and including October 13, 1960, at Jewett City, Connecticut, within the jurisdiction of this Court, Frank Romano, John Ottiano, the defendants herein, did, in violation of Title 26, United States Code, Section 5601(a)(1), have in their possession, custody and under their control, a still and distilling apparatus set up which was then and there not registered as required by Title 26, United States Code, Section 5179(a).

COUNT TWO

On divers dates between September 1, 1960 to and including October 13, 1960, at Jewett City, Connecticut, within the jurisdiction of this Court, Frank Romano, John Ottiano, Edward Romano, Antonio Vellucci, Samuel I. Cohen, Israel Yarchin, The Griswold Corporation of

[fol. 31] Jewett City, Connecticut, the defendants herein, did, in violation of Title 26, United States Code, Section 5601(a)(8), then and there not being distillers authorized by law to produce distilled spirits, produce distilled spirits by distillation and other process from mash, wort, mash and other materials.

COUNT THREE

On divers dates between August 1, 1960 to and including October 13, 1960, at Providence, Rhode Island, in the District of Rhode Island, at New Bedford, Massachusetts, in the District of Massachusetts, at Jewett City, Connecticut, within the jurisdiction of this Court, Frank Romano, John Ottiano, Edward Romano, Antonio Vellucci, Samuel I. Cohen, Israel Yarchin, The Griswold Corporation of Jewett City, Connecticut, the defendants herein, did, unlawfully conspire, agree and confederate together, with one another and with each other, in violation of Title 18, United States Code, Section 371, to commit an offense against the laws of the United States, to wit: a violation of Title 26, United States Code, Section 5601(a)(8), producing distilled spirits by distillation from mash, wort, wash and other materials, then and there not being distillers authorized by law to produce distilled spirits, and did commit, among others, the following overt acts in furtherance of and to effect the object of the conspiracy.

OVERT ACTS

1. On divers dates between September 1, 1960 to and including October 13, 1960, the co-conspirators and defendants herein, Edward Romano, Frank Romano, John Ottiano, did visit the premises at the Aspinook Mill, Jewett City, Connecticut, within the jurisdiction of this Court where an illegal distillery was in operation producing distilled spirits.

[fol. 32] 2. On divers dates between August 1, 1960 to and including October 13, 1960, the co-conspirator and defendant herein, Samuel I. Cohen, did, while President of the aforesaid defendant, Griswold Corporation, the owner

of the premises known as the Aspinook Mill, at Jewett City, Connecticut, within the jurisdiction of this Court, make available the aforesaid premises to those engaged in producing distilled spirits, not then being a legal distiller.

3. On divers dates between September 1, 1960 to and including October 13, 1960, the said defendant and co-conspirator, Antonio Vellucci, did aid in the transportation of raw materials used in distillation of distilled spirits to the aforesaid premises from Providence, Rhode Island.

4. On divers dates between September 1, 1960 to and including October 13, 1960 the said co-conspirator and defendant, Israel Yarchin, at New Bedford, Massachusetts, did supply raw materials used by illegal distillers at the aforesaid premises.

A True Bill

/s/ Edgar Tullock
Foreman

/s/ Harry W. Hultgren, Jr.
United States Attorney

/s/ Francis M. McDonald
Assistant United States Attorney

I hereby certify that the foregoing is a true copy of the original document on file.

GILBERT C. EARL, Clerk
LURA G. ELLSWORTH, Deputy Clerk

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[fol. 211]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 10284

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* * * *

TRANSCRIPT OF TRIAL—

THURSDAY, MAY 3, 1962

(The jury was seated.)

The COURT. Good morning, ladies and gentlemen.

Before we proceed this morning, I think the jury should be acquainted with an agreement of counsel made yesterday afternoon in regard to procedure. Because there are multiple defendants, and because it might be claimed certain evidence is applicable to one defendant, and not to another, and in order to avoid counsel in multiplicity getting up and making objections, thereby tending to delay progress of the trial, counsel agreed that except for specific objections, that general objections in relationship to the admission of evidence as to particular defendants, would be withheld until after the Government had completed its direct examination of the particular witness, the Government witness on the stand.

[fol. 212] The jury would then be excused for a few minutes, and we hope only a few minutes, during which time counsel will then make their technical objections, if any, on the record, out of the presence of the jury. So,

the jury will not hear their arguments, and be caused to be affected in any way by those arguments.

The jury would then be recalled and advised by the Court as to its ruling, and counsel will then proceed with cross-examination. It is believed that such procedure will expedite our progress.

Direct examination by Mr. Markle:

Q. Mr. Nadel, I believe the last question I addressed to you yesterday was whether or not you recognized the two men that you saw in the premises. A. I do.

Q. Do you see them here in court? A. I do.

Q. Would you point them out, please, to the ladies and gentlemen, of the jury, and to the Court? A. The gentleman seated nearest the wall, in the first bench.

The COURT. Would you stand, please, so that we can get a specific identification by the witness?

The WITNESS. That's John Ottiano.

Mr. MARKLE. May the record note that he does indicate that man, John Ottiano.

The COURT. Is that agreed, gentlemen, that the man standing is John Ottiano?

Mr. FLYNN. He's my client, and I identify him as such, your Honor.

The WITNESS. The man sitting alongside of him is Frank Romano.

By Mr. Markle:

Q. Is that the other man that you saw? A. That is the other man that was on the premises.

[fol. 213] Mr. MARKLE. May the record so indicate?

Mr. FLYNN. The record indicates Frank Romano has been properly identified, your Honor.

By Mr. Markle:

Q. And whether or not you had any conversation with these men at that time? A. I did.

Q. And would you relate what was said by them and what was said by you, and identify them, as to who said what?

* * * *

The WITNESS. I asked Frank Romano how long the still had been operating. He said to me. "I don't know; I have been here only three days."

I then asked the same question as to how long the still had been operating of John Ottiano. He said, "I don't know; I only drove the truck down here with the stuff."

I then asked Frank Romano how to turn the still off. He turned, and he pointed to the wall in the northwesterly section of the building. He said, "Pull that switch."

I then went over and pulled the switch, which shut off the oil burner to the steam burner.

By Mr. Markle:

Q. Whether or not after Mr. Ottiano—was Mr. Ottiano arrested? A. They were, sir.

Q. What, if anything, did you do with reference to Mr. Ottiano? A. On arresting John Ottiano, with Investigator Shaw, I conducted a wall search of the person of John Ottiano.

Mr. FLYNN. Conducted a what?

The WITNESS. A wall search.

[fol. 214] Mr. FLYNN. A wall search?

The WITNESS. On the person of John Ottiano I found two key rings. One holding two keys, and one holding four keys, with a little identification tag, a miniature marker tag on it, and a piece of paper which I read, and it indicated that it was a bill of sale of a 1950 Buick to John Ottiano from one Stephen Broccoli.

Q. As to the keys, what, if anything, did you do with them? A. On October 13th, I tried these keys; determined what, if anything, they worked. I found that one key—

Mr. FLYNN. Objection. No question pending.

By Mr. Markle:

Q. Did you try the keys in the various locks? A. I did, sir.

Q. What keys did you try in what locks? Question withdrawn.

Q. Do you have the keys with you? A. I do, sir.

Mr. MARKLE. May they be marked for identification, if the Court please?

The COURT. This will be Government's Exhibit 2 for Identification only. Will you state for the record what that exhibit for identification is?

Mr. MARKLE. Yes, sir.

The COURT. You referred to two key rings.

Mr. MARKLE. Exhibit 2 is a key ring bearing a miniature license plate put out by the Disabled Veterans, AN949, Rhode Island, '59, consisting of a key, which reads, upon which reads the legend, "Master Lock Company." And a key which reads, "Keil," and has a legend 153TH, printed on the back of that key.

Another key reading, "Keil," and having as a legend on the back the number 155. The last key reading, "Elgin," and having on the rear a number DL3002.

[fol. 215] The COURT. Do I understand that is the exhibit being offered as Government's Exhibit 2 for Identification only?

Mr. MARKLE. Yes, sir.

Mr. FLYNN. There also appears in this some writing on the identification tag. Apparently, it wasn't on the exhibit when it was removed from the person of John Ottiano.

The COURT. Do you claim anything prejudicial on that?

Mr. FLYNN. I don't know.

The COURT. For the convenience of the Clerk, to attach it—

Mr. FLYNN. It is stamped on one side by the Clerk. I would suggest however, that the Clerk blank the other side.

The COURT. Any objection to that?

Mr. MARKLE. No, sir.

(Two key rings received and marked as Government's Exhibit 2 for Identification.)

By Mr. Markle:

Q. Mr. Nadel, have these been in your possession at all times? A. No, sir.

Q. Where have they been when not in your possession, if you know? A. Yes, sir. They were in the possession of the supervisor, the then-supervisor in charge, John E. Norton, from October 16, 1960, to March 24th, 1962.

Q. What, if anything, happened on March 24th, 1962, as pertaining to the custody of these keys? A. I was designated at that time as Acting Supervisor in charge for Connecticut, Rhode Island, and took custody of all seized properties, including those keys.

Q. Has it been in your custody since that day, to the day of this trial, and to the date of this production? A. To the date of this production.

[fol. 216] Mr. MARKLE. I would offer these as a full exhibit.

Mr. FLYNN. I suppose the witness has identified them, your Honor, but I don't think the chain of evidence is complete as to the custody and identification, since it has been apparent from this witness' testimony that the possession of these instruments has been out of his control for a period in excess of six months. As a matter of fact, I think a year.

The COURT. Can counsel inquire of the witness whether or not they are the same identical keys that he took off the person of the alleged defendant?

By Mr. Markle:

Q. Showing you these keys, which are Government's Exhibit 2 for Identification, I ask you whether or not, sir, those keys are the exact same keys taken from the person of the defendant on October 13, 1960? A. They are, sir.

Mr. MARKLE. I would offer these, if the Court please. The chain of title would only go to the weight being given them. If it was tampered with—it's been testified they have been in the custody of a duly authorized person of his department until they were returned to his custody and control.

It is testified that they were the same keys that he took off the man in the day in question, and they are today the same keys.

The COURT. Any objection to them?

Mr. FLYNN. May I inquire, your Honor? I believe I'll have an objection, but I'd like to make an inquiry on the offer, if I may.

The COURT. You may.

By Mr. Flynn:

Q. Mr. Nadel, your means of identifying these keys on this ring is by means of the legend that appears on the reverse side, on one side of a card which is attached to the chain; isn't that correct? A. No, sir; I did not need that card.

[fol. 217] Q. I'm asking now about the keys, Mr. Nadel. A. I'm speaking of the keys, Mr. Flynn.

Q. You have some mark on each of these keys? A. No, sir. I refreshed my memory from my notes. I recognized those keys to be those that I had taken from the person of John Ottiano on the morning of October 13, 1960.

Q. Do I understand then, Mr. Nadel, that the keys bearing the markings that have been described by Mr. Markle you made some notations at some time, as to the key manufacturer, and as to some code number, if one appears, on each of these keys? A. That is correct, sir.

Q. Is that correct? A. Yes.

Q. And you referred to your notes that you made on what day, sir? A. October 13, 1960.

Q. And these notes show the color, character and markings of all of the keys? A. They show certain identifying marks that identify those keys to me.

Q. And that is your sole means of identification? A. That is the only means, other than the tag that is affixed to it.

Mr. FLYNN. I object.

Mr. MARKLE. I claim if, if the Court please. I think the Robinson case against the United States, 283 Fed. 2nd, 508, which says where exhibits have been kept in police custody the chain of possession must be reasonably accurate. But not requiring that every person with access to them be called to testify. There is no evidence

here, if the Court please, that these have been changed, and these are objects taken from the defendants by this man's testimony, on the date in question, and by virtue of [his] notes he's been able to identify them, and I would claim they are admissible under that.

I would also claim, if the Court please, that these are part of the res gestae, and this is an important claim. [fol. 218] Under Kelly against United States, 46 Fed. 2nd, 286, and other cases of that type, these are exhibits taken from these people at the time of arrest, and it is part of the res gestae.

The COURT. Is Mr. Norton available, counsel?

Mr. MARKLE. Yes, sir. Mr. Norton is available, and I would put him on.

The COURT. If Mr. Norton and witnesses in succession were to testify, would you have the same objection?

Mr. FLYNN. I would not, but the witness has identified only the key, sir. There is also an additional object on the ring that he has not identified by virtue of holding some mark. I asked him if he made any mark on the object, and he said he did not. The ring contains an additional object other than keys.

The COURT. If that were identified by the witness, would you still have the same objection?

Mr. FLYNN. Well, subject to Mr. Norton's identifying it, or Mr. Markle stating he is prepared to offer him, I think my objection would have to be conditional, your Honor.

Mr. MARKLE. Well, I will offer Mr. Norton. I have no objection to that. I might help clarify this.

By Mr. Markle:

Q. Do your initials appear here on Government's Exhibit 2 for Identification? A. They do.

Q. Under what date? A. Under date of October 13, 1960.

Mr. MARKLE. May the record indicate that he refers to the right-hand corner of the card, which is attached hereto.

Q. Do other initials appear thereon? A. They do, sir.

Q. Whose initials are these, if you can identify them, [fol. 219] sir? A. These immediately below mine are those of Investigator John J. Shaw.

Q. And beneath that? A. On the lower corner are those of John E. Norton.

Q. And is there a legend or date under his initials? A. There is, October 16, 1960.

Mr. MARKLE. May the record indicate that he indicates the lower right-hand corner, if the Court please, of the card showing Mr. Norton's initials.

The COURT. One other objection has been made. The witness has been asked to idetnify another object on the key. I presume he is asked to identify a tag. Would you inquire concerning that?

Mr. MARKLE. Yes, your Honor.

Q. Showing you again Government's Exhibit 2 for Identification, I am directing your attention to the small license tag, AN949. Whether or not that was on the key chain attached to the keys on October 13, 1960? A. It was, and I have so stated previously.

Q. And was this on the key chain at the time you took these keys from Mr. Ottiano? A. It was, sir.

Q. Was this identified, also, as part and parcel of the keys that were taken? A. It was, sir.

Q. And was this exhibit held together at all times in this manner? A. It was in the same manner as you now see it after the affixation of the tag.

By Mr. Flynn:

Q. Apparently, three people handled these, two others than yourself; is that right? A. That's correct.

Q. In other words, you turned these keys over to Mr. Shaw? A. That's right, sir.

Q. And your story is that Mr. Shaw turned them over to Mr. Norton sometime, and sometime in March of that year, turned them over to you? A. Mr. Shaw turned them over to me on October 16th. I, in turn, turned [fol. 220] them over to Mr. Norton on October 16.

Q. In other words, you took them from Mr. Ottiano and gave them to Mr. Shaw; Mr. Shaw gave them back to you three days later, and then you gave them to Mr. Norton? A. That's right, sir.

Q. And this was in 1960? A. That's correct.

Mr. FLYNN. I will have objection to the legend on the back of the card. I have objection to the little registration card, it is for a year precedent the year in question. Again, it has no affirmative bearing on the issues in the case.

The COURT. Does your objection to the sequence of procession stand, counselor, if so—

Mr. FLYNN. No, sir.

The COURT. It doesn't?

Mr. FLYNN. No.

The COURT. The identification, whatever is on the back of the card, do you claim that for the Government?

Mr. MARKLE. No. As possession has been established, I have no claim as to anything on the rear of the card.

The COURT. The Clerk, then, may obliterate that. The other objection of counsel to the numbers or figures, whatever appears on the tag, that objection has been made, and that objection is overruled. The offer as a full exihibit is granted by the Court and it may be admitted as a full exhibit, as Government's Exhibit 2.

(Government's Exhibit 2: Keys and tag.)

[fol. 221] By Mr. Markle:

* * * *

What, if anything, did you do with those keys, if anything, on October 13, 1960? A. I went to the large door, through which I had entered the premises, and in which John Ottiano had been arrested, and on the large outer door I tried these keys in a lock, an Elgin lock, and I found that this key that I hold in my hand bearing the brand, "Elgin," and the numbers DL9002, and found that this operated the night latch on this large door.

On this extremely large door, there was a small inner door, and on the inner door, on the inside of the inner door, I found a padlock and I found that this key operated the padlock on this inner door.

Q. Would you identify that, Mr. Nadel, for the record? A. This is a master. Then I went to the gate entering the Aspinook Mill property through which I had entered

shortly before 7:30 a.m. on October 13, 1960, and on the gate, on the right-hand side of the gate, that is, the gate had two parts—no, I take that back.

But in any event, on the right-hand side, there was a padlock on a chain, a lock on a chain. Now, the particular gate was the second, which I subsequently learned was the second of the two gates leading into the Aspinook Mill property, and the particular gate that I refer to was at the lower end of Anthony Street, Jewett City.

Q. Would you identify that key for the record? A. I will, sir. And I found that this key, bearing the brand name, "Keil," operated the lock on this chain which was at the gate.

The fourth key, which also bears the name, "Keil," I was not able to find any lock on the premises that this key operated.

Q. Now, just so that there is no confusion, Mr. Nadel, I ask you whether or not you have reference to the one [fol. 222] you were unable to identify to any lock on the premises, and is the number 153, that is the Keil? A. That is correct, sir. I then turned these keys over to the custody of Investigator John J. Shaw on October 16th.

Mr. FLYNN. Your Honor, he was only asked a question as to what happened on October 13th. May I request the Court to perhaps, for the purpose of identification, because we only have numbers at this stage, that we associate these keys with 2-A, 2-B, 2-C, 2-D?

The COURT. Does the Government have any objection to that?

Mr. MARKLE. No, sir.

The COURT. The Elgin key may be identified as 2-A; the master key, so-called, will be referred to as 2-B, the first Keil key referred to may be referred to as 2-C; and the fourth key referred to as the Keil key number 153 may be referred to as 2-D.

By Mr. Markle:

Q. Directing your attention, sir—

Mr. MARKLE. Well, if the Court please, might these be marked for identification?

The COURT. In other words, this is the second key ring that counsel presently is offering for identification only as Government's Exhibit 3?

Mr. MARKLE. Yes, sir.

The COURT. It may be marked.

(Government's Exhibit 3 for Identification: Two keys.)

Mr. FLYNN. Your Honor, may I make an inquiry to expedite this while the Clerk is marking this?

The COURT. Certainly.

[fol. 223] By Mr. Flynn:

Q. I would assume that all of the chain possession with respect to the ring, your testimony would be identical with respect to the chain on this ring as with respect to the chain of possession of Exhibit A, B, C, & D? A. That's correct, sir.

Mr. FLYNN. That will save time anyway, your Honor.

By Mr. Markle:

Q. Showing you Government's Exhibit 3 for Identification, are these also the two keys which were found on the person of Mr. Ottiano? A. They were, sir.

Mr. MARKLE. I would offer these as full exhibits, if the Court please.

The COURT. Any objection, counselor?

Mr. FLYNN. The same objection that I made before.

Mr. CALVOCORESSI. I may make only such objection as may be made at the end of this witness' testimony, if I understand the ruling as to the evidence?

The COURT. Yes.

Mr. FLYNN. I would expect the Court to make the same ruling on my objection.

The COURT. In this specific instance, there is no specific tag, as I see it, as there was on the back of the tag that had information that was obliterated.

Mr. MARKLE. Your Honor, I misled the Court. I didn't mean to interrupt, but I asked Mr. Markowski to remove the tag.

Mr. FLYNN. And I was aware of that.

Mr. MARKLE. I then advised Mr. Flynn. I should have waited until he had seen it.

The COURT. So that objection has been eliminated?

Mr. FLYNN. Yes, sir.

[fol. 224] The COURT. Now there is no tag with any numbers on this particular key ring.

Mr. FLYNN. Just two keys.

Mr. MARKLE. Which I will identify for the record.

The COURT. And your former objection to the little tag with these initials on it, that doesn't appear here, so that objection doesn't lie in this instance.

Mr. FLYNN. That's right.

THE COURT. So, therefore, there is no objection to rule on; is that right?

Mr. FLYNN. There is a question of the identification of these keys as being the same keys, same keys by some number or designation. That, with respect to these keys, has not been asked. I only ask him about the chain of possession and not about the identification of these being the specific keys.

The COURT. Your objection in the previous instance wouldn't apply in the present situation.

Mr. FLYNN. I'm sorry.

By Mr. Markle:

Q. Directing your attention to Government's Exhibit 3 for Identification, and I ask you whether or not these are exactly the same keys removed from the person of Mr. Ottiano on October 13, 1960, at the Aspinook Mill premises? A. Yes, sir.

Mr. MARKLE: I would now offer them, if the Court please.

By Mr. Flynn:

Q. Do they bear some mark or identification, Mr. Nadel? A. One bears the name of Sargent and the numerals K44977, and there appears to be an "X" at the end. The other one has no identifying marks, but appears [fol. 225] to be the same little ring and is the same size and shape, and similar in every manner to the key that I took from John Ottiano on the morning of October 13, 1960.

Q. This identification, Mr. Nadel, again you were aided in it by having refreshed your recollection by referring to some notes that you made on or about the 13th day of October last; is that right? A. That's right, sir.

By Mr. Calvocoressi:

Q. Is there anything on that second key which will help us keep it straight, a brand name, or anything of that nature? A. Nothing, sir.

Mr. MARKLE. There is on the Sargent key, I would represent, a number on the rear which I might read into the record.

Mr. FLYNN. It has already been stated.

The COURT. It is already in the record.

Mr. MARKLE. I would offer it, if the Court please, as a full exhibit.

The COURT. If there is no objection, it may be offered as a full exhibit, as Government's Exhibit 3.

(Government's Exhibit 3: Keys.)

By Mr. Markle:

Q. Now, Mr. Nadel, did you ascertain what doors, if any, these keys—and I have reference now to Government's Exhibit 3—opened? A. I tried those keys on the locks on the premises, and I found no lock which those keys operated.

Mr. FLYNN. Your Honor, I am going to ask, then, to have the exhibit eliminated. It was offered as a full exhibit to establish something, and now we find that it fitted nothing on the premises.

Mr. MARKLE. Your Honor, if I didn't put them in, they would claim—there is a possibility of a claim that I was trying to hide something that was found on the person [fol. 226] of the man. I am just trying to clear the record of what this search disclosed.

The COURT. The Court will allow it as an exhibit. It goes to the weight. If it doesn't apply to the evidence, it will bear no weight.

Q. After you entered the premises, what, if anything, was seen by you on the premises? A. As I entered

through the large front door into this small entry, I observed on the right-hand side cartons, cardboard cartons stacked up against a partition. In front of these cartons, there was a dolly or a wagon, and on it, I observed a couple of bags. And I continued on through the larger room where I observed Frank Romano and John Ottiano.

Q. What, if anything, else did you do? A. And I observed on the furthest wall, from the wall through which I entered, I observed rising towards the ceiling two still columns rising out of a cooker or a still pot. I also observed metal tanks lined up in front of the still pot.

I observed numerous sugar bags lying on the floor. I saw and heard the noise of a steam boiler. I smelled the odor of fresh mash, and I heard the motor of an electric burner operating.

I saw a dolly with some sugar bags on it. I saw an electric refrigerator. I saw several bags of—at that moment, I could not identify what substance on the floor. And as I entered through the entry-way and glanced down towards my right, I observed a large oil tank, storage tank, which I subsequently examined and found to be one thousand, five hundred gallon capacity.

I observed numerous pipes running to the metal vats which I observed on my entry. I observed numerous pipes of all various sizes and shapes on the floor. I observed a condenser to the south, to the east of the still columns. I observed pipes leading from the still columns themselves to the second floor. I observed a steel tank—

[fol. 227] By Mr. Flynn:

Q. You heard something going to the second floor? A. I said I observed pipes rising from the still columns towards the second floor. I observed near the boiler, and rising to the second floor, a flue or chimney, or heat pipe, which I subsequently examined and found to be of asbestos-type.

I observed a partition, rather a plywood, a piece of plywood which was against the northerly wall extending —rather, the westerly wall extending in an easterly direction towards the room, possibly four or five feet in

width at about six feet in height which, as you came in through the large door faced you.

On the other side of this, I observed a facility for sanitary disposal. I observed lengths of hose, puddlers. I observed steam pipes leading from the boiler to the cooker.

I observed what I subsequently found to be waste pipes leading from the metal tanks that I stated I observed, and these waste pipes led, one through an opening to underneath the building and emptied into the river below, and one I found led out through a door on the northerly side of the building and extended out into the river itself.

On examining the tanks that I observed on my entry, I found there to be nine metal tanks, two to be stainless steel, the other to be steel.

On the examination of these tanks, I found eight of them to contain various amounts of fermenting mash. I found one to be empty, but on examination of this one, found that it still held the odor of mash.

I found that these tanks were on a wooden platform or canter in the direction of the cooker at a slight angle; and that each of these tanks were connected by a series of pipes to the cooker, and at a Y before the cooker, one with a series of valves, * * * A. (Answering) One pipe led to the cooker, one pipe led directly to the wasteline. I examined these eight vats—pardon me—which I found [fol. 228] to contain various amounts of mash, and determined that they were in various—I take that back. I withdraw that, please.

I observed down below the condenser, which was in an easterly direction from the still pot and columns, I observed pipes leading from the condenser directly to a steel receiving tank.

Now, to the east of the steel receiving tank, I observed a number of cardboard cartons and a number of five-gallon tin cans. I examined these tin cans, and I found twenty-four of these tin cans, * * *

* * * *

By Mr. Markle:

Q. The question being: What did you see as to those? A. I saw an uncolored, or colorless liquid, and I observed that none of these twenty-four five-gallon cans bore any Government stamp.

Q. Now, Mr. Nadel, as to the uncolored liquid, whether or not there was a distinctive odor? A. There was a distinctive odor.

Q. What would you describe that odor as being? * * *

The WITNESS. I found at least twenty-four five gallon tins had the distinct odor of distilled spirits of alcohol. I also observed a one gallon glass jug which was approximately three-quarters full, which on examination I found to be a colorless spirit alcohol—that is, I am sorry. I found it to contain a colorless liquid which on examination I found to have the distinctive odor of distilled spirits of alcohol. I observed no stamp, no Government stamp affixed to the container.

By Mr. Markle:

Q. What, if anything else, Mr. Nadel, did you do on the premises that day? A. Along side the still columns, [fol. 229] near the condenser, I observed a very large ladder, approximately eighteen feet in length, leaning against the wall.

I climbed this ladder and observed that the pipes leading from the still column, the left hand still column, as you faced it, led through a hole in the floor of the second floor. Through this hole I observed a copper dephlagmator connected to the still column, by the pipes leading from the column, I observed pipes leading from the dephlagmator to the condenser on the first floor.

This was my preliminary examination of the premises.

Q. Now, I show you what purports to be photographs, and ask you to examine them, and I will question you from these.

* * * *

Mr. CAPLAN. Is there an offer of all these photographs?

Mr. MARKLE. There is an offer of all these photographs.

Mr. CALVOCORESSI. Might they be marked for identification first, your Honor, so we can understand what we are talking about. I, myself, will have objections to only one of them.

(The jury was seated.)

Mr. MARKLE. If the Court please, there are twenty-three photographs which I would offer for identification, and ask that they be so marked at this stage.

The COURT. Without objection, they may be so marked for identification only.

Mr. MARKLE. There are exhibit numbers that appear on those photographs on the paper, stapled to the rear. I make no claim as to the exhibit numbers appearing on the bottom, and they may be X'd out, if the Court so desires.

Mr. CALVOCORESSI. I would request that they be, because it would be very confusing to have two numbers.

The COURT. Any other number on the back of the photograph, except as fixed by the clerk, will be obliterated.

[fol. 230] Mr. FLYNN. May I inquire how many photographs there are?

Mr. MARKLE. Twenty-three, I think.

The COURT. Each photograph should have a separate number, starting with number four.

(Photographs received and marked as Government's Exhibits for Identification number four through twenty-six.)

By Mr. Markle:

Q. Mr. Nadel, I show you Government's Exhibits marked for identification number 4-26 and ask you whether or not these pictures were taken under your direction, and under your supervision, on October 13, 1960, at the still premises. A. These pictures were taken at my direction.

Q. And I would ask you, sir, on October 13, 1960? A. Yes, sir.

Q. And are they a true and accurate representation as the premises as seen by you on said date? A. They are, sir.

Q. And they do show the premises as a true and accurate reproduction? A. That is correct, sir.

Mr. MARKLE. I would offer these, if the Court please, as full exhibits.

Mr. FLYNN. Your Honor, I believe that the better evidence with respect to this offer would be the physical objects displayed in each of these photographs. But, on the representation by the Government that they will offer the physical evidence as shown by these photographs—whether they are prepared to offer it—I would think since they are fair and reasonable representations of what he saw, they would otherwise be admissible.

But, with respect to all but three of them, with respect to three of the offered exhibits, I would have objection in that they are not part of the testimony of this wit- [fol. 231] ness as to what he saw after he entered the still premises—using Mr. Markle's language.

The COURT. You haven't made a specific objection yet, counsellor, to any specific proposed exhibit.

Mr. FLYNN. I would object to all of them on the grounds of the best evidence rule. As far as reasonable representations on exhibits 7 through 26, I have no objection. I don't know about Mr. Calvocoressi and Mr. Caplan.

The COURT. The first objection is overruled.

Mr. FLYNN. As to Exhibits 4, 5 and 6, they are not fair and reasonable representations, and I would offer them to the Court for observation of the interior of the still property.

Mr. MARKLE. I offer them as the premises as observed by him, and as testified by him. I don't limit it to the inside, if the Court please. If I did, then I would request that my offer be broadened to include the outside of the premises, as portrayed by those pictures.

The COURT. Referring your attention to Exhibit 6 for Identification, at the present moment, it does not appear to be in keeping with what evidence has been offered for the moment.

Mr. MARKLE. I thought it had. I would withdraw that offer for now, subject to connection, if the Court please. I'm sorry.

The COURT. And do I understand that—I think there was testimony, or if there hasn't been, maybe you should bring out testimony, as to these, before the Court rules on them, 4 and 5.

By Mr. Markle:

Q. Mr. Nadel, I believe you testified that parked outside of the premises was an Ford truck; is that correct? A. That is correct, sir.

[fol. 232] Q. And did you have occasion to go into the truck? A. I did, sir.

Q. And did you have occasion to observe the rear of the truck? A. I did, sir.

Q. And what, if anything, did you see on the rear of the truck? A. A number of 55 gallon, steel drums.

Q. And I show you Government's Exhibit 6 for Identification and ask you if that is an accurate representation or portrayal of what you saw on the rear of that truck on October 13, 1960. A. That is, sir.

Q. I show you Government's Exhibit 4 for Identification, and ask you whether or not that is an accurate and true portrayal of the outside of the premises of the Aspinook Mills on October 13, 1960, limiting you to the still premises. The building in which the still was; is that an accurate representation of the outside of that building on that day, as observed by you, sir? A. As observed by me that is the way I saw it on the morning of the 13th of October.

Q. I show you Government's Exhibit 5 for Identification, which purports to be a truck, and ask you whether or not that is a true and accurate portrayal of the location of the truck seen by you on October 13, 1960? A. That is.

Q. Were these photographs taken on October 13, 1960? A. They were taken on the 13th of October, 1960.

Mr. MARKLE. I would then offer these, if the Court please.

Mr. FLYNN. Your Honor, I believe I will adopt Mr. Calvocoressi and Mr. Caplan's motion with respect to certain of these exhibits, for the reasons that they would state. I would have objection to the exhibits, but I think the record is already cleared by some preliminary hearings in this matter, why I would not be the one who could properly make the objection at this time.

Mr. CALVOCORESSI. Your Honor, so that Mr. Flynn [fol. 233] should not lose an objection which he may have, I'm only going to object to Exhibit 4 for Identification.

The COURT. What is your objection?

Mr. CALVOCORESSI. If your Honor please, under order of this Court—I believe it was your Honor's order that the Government was ordered to show us, before trial, the photographs which they would introduce, showing the alleged still, or the still equipment. Exhibit 4, to the best of my recollection, was not shown to us. And, by the witness' testimony, it does show a part of that equipment to which I am indicating with my finger.

The COURT. Is it your claim that the equipment was not shown to you, counsellor?

Mr. CALVOCORESSI. I'm sorry. I gave your Honor the wrong impression. I was referring to the order that we should be shown photographs of which the Government would offer in evidence, of the alleged still, and materials, and so forth. Now, that photograph, Exhibit 4, was not shown to us, and does show a part of this equipment.

The COURT. Did you have any comment to make on that, counsel?

Mr. MARKLE. I'm handicapped by the fact that at the time I did not turn over these photographs to Mr. Calvocoressi, nor do I know exactly what was offered to him. I would think if he says it wasn't, it may very well not be. I would think that the order—and I'm not sure of the order, but I think the order referred to the interior of the still premises, if the Court please. If he's been misled in any way I would not press this picture.

I just don't want to do anything that will prejudice him. I think that there's been sufficient evidence, or there will be, that what that picture purports to show.

The COURT. Very well. If the photograph was not offered by the Government, pursuant to the Court's order, the objection to the photograph which has been offered for identification, number 4, is sustained.

[fol. 234] Mr. MARKLE. As to it being a full exhibit?

The COURT. As to it being a full exhibit.

Mr. MARKLE. Might I reserve my rights to check the Court's ruling on that, if it is a matter of interpretation, might I argue it further, if the Court please?

The COURT. Of course now would be a good time to have the order of production, and now would be a good time, rather than later, counsellor.

Mr. CAPLAN. May I make a statement, your Honor?

The COURT. I want first to determine whether or not counsel for the Government proposes to make any further statement with respect to Exhibit 4.

Mr. MARKLE. No, sir, I do not press it, if Mr. Calvocoressi is correct I would think I had no right to press it, and would not press it.

The COURT. Very well. Mr. Caplan, the Court will now hear you.

Mr. CAPLAN. My notes show that a few weeks ago the Government showed us a lot of photographs that were marked numbers 29 through 49, consecutively, inclusive. And three of them here, 28, 27 and 26—these are the numbers that have just been scratched off, were not shown. I don't know whether it was an oversight on the Government's part, but it seems to me that these photographs should have been shown in compliance to the Court's order.

Mr. MARKLE. To those three photographs, if that is true, I would not offer these, either, as full exhibits.

Mr. CAPLAN. But, as to all these here, they were shown to me, and I have no objection.

The COURT. Would you identify those three?

Mr. MARKLE. The three in question, if the Court please, are 4, 5, and 6.

The COURT. Based upon the representation of counsel, and the acquiescence of the District Attorney, the objec-

[fol. 235] tion is sustained as to the admission of 4, 5 and 6 as full exhibits. As to all others, numbered ex-

hibits between 4 and 26, except for 4, 5 and 6, the Court orders that they be made full exhibits, and may be so admitted.

(Government's Exhibits 7 through 26 for Identification, received and marked as full exhibits.)

Mr. FLYNN. While the attorney is checking his notes—there was some inquiry of the witness with respect to two of those exhibits, which objection has now been sustained on.

I would think it would be appropriate for me to request the Court to strike that testimony from the record, and to instruct the jury that they should not properly consider it.

The COURT. You don't claim that, do you counsellor?

Mr. MARKLE. No, sir.

The COURT. As to Exhibits 4, 5 and 6, which the witness referred to, that testimony may be stricken from the record, and the jury will disregard the reference to what he saw.

Mr. MARKLE. As far as the photographs are concerned?

The COURT. As far as the photographs are concerned.

Mr. MARKLE. If I might, if the Court please, while these are being examined, so that there will be no confusion on the record—

By Mr. Markle:

Q. Mr. Nadel, disregarding the photographs which you have just seen, whether or not you had occasion to examine the truck? A. I did, sir.

Q. And would you describe when you did that, sir? A. The morning of October 13, 1960.

Q. What, if anything, did you find on that truck? A. I found steel 55 gallon drums in the van portion of the truck.

Q. And what, if anything, did you do with relation to these? A. I examined the contents of one of the drums and found it to be full of molasses.

[fol. 236] Mr. FLYNN. Now, your Honor, the witness is doing it again. I ask that the evidence go out. I don't

know whether or not there was molasses—and there probably was molasses, but that calls for a chemical analysis. He could say it had fluid in it; it was dark; it had some odor; it smelled like something that seemed to him to be molasses.

The COURT. The Court's ruling is that the objection is overruled. Any reasonable person with common sense knows molasses when he smells or tastes it. If it can be brought out that based on this he made his findings, then certainly it is admissible evidence. But, if the objection is to the basis for it, as to what he did to determine what was in it, it hasn't been brought out how he approached it. It might be oil, or some other dark substance. We don't know that. If that is your objection, if your objection was to that, it would be in order.

The Court will suggest to counsel that he proceed to determine what the witness did; what he observed physically about the substance, and whether he tasted it and smelled it, or otherwise.

By Mr. Markle:

Q. What, if anything, did you do, bearing in mind that I would like you to describe—question withdrawn.

What was found in the barrel as you observed it? A. I opened the fill hole, the fill cap, and I screwed the fill cap, and observed a dark, thick substance. I put my finger in it and I smelled it, and tasted and smelled it, and found it to be molasses.

Mr. FLYNN. Now, my objection is withdrawn, your Honor.

By Mr. Markle:

Q. Mr. Nadel, you have given me, as I recall now, what was done by you, and what was observed by you upon [fol. 237] your entry into the premises on October 13, 1960; is that correct? Preliminarily? A. That was my preliminary examination, sir.

Q. Directing your attention to the exhibits which are now in evidence, these photographs, would you describe to the ladies and gentlemen of the jury and to the Court

and counsel what those photographs represent in detail, as observed by you on that day?

The COURT. Suppose we take them one by one?

Mr. MARKLE. Yes, sir.

The COURT. Starting with the first one, which would be number 7.

Mr. MARKLE. Yes, sir. If the Court would allow me—if I might make a suggestion—I would like to take them as he entered the premises, so it might be easier for the jury to follow, and these are not necessarily in numerical order. With the Court's permission?

The COURT. Very well.

By Mr. Markle:

Q. Showing you Government's Exhibit 15, I would ask you to describe in detail to the ladies and gentlemen of the jury what that photograph represents. A. This door that you can see on this side of the picture—

Q. Just a minute, Mr. Nadel. Mr. Calvocoressi has a suggestion that I think is well-taken. If I may put this up here, and so I can turn it for both you and the jury and counsel, it might be better.

The COURT. Primarily we want the jury to see it. The Court will have plenty of time to look at it.

Mr. MARKLE. Yes, sir. If anybody in the jury can't see it, will you kindly make it known to me?

The WITNESS. This is the doorway through which I entered the morning of October 13, 1960. These cardboard cartons were on my right as I entered through the [fol. 238] door. This is the dolly, or the wagon that I spoke of, that contained bags of some unknown substance, to me at that time.

I subsequently examined some of these cartons and found them to be full of one-gallon glass jugs, all empty.

And, this is the plywood partition that I spoke of. This is a small entry, possibly twelve feet in length, and maybe fifteen or twenty feet across.

This is what I saw as I immediately entered—just the way you see it there.

Mr. MARKLE. I would ask you to examine these and show me what you next saw, and if you will hand it back to me, just for the purposes of identification?

The next one is Government's Exhibit 13, for the record, if the Court please.

The WITNESS. As I came through this outer entry—I'm sorry, Mr. Markle, I got the wrong one.

Mr. MARKLE. The offer is withdrawn, for the moment, if the Court please.

The COURT. Exhibit 13 is temporarily withdrawn.

Mr. MARKLE. Yes, and Government's Exhibit 25, if the Court please.

The WITNESS. This partitioned-off plywood section, this particular wall, to which my pen is pointed, is that wall against which those cardboard cartons were standing in the previous photograph.

As I came through this entry, Mr. Romano and Mr. Ottiano were standing about here, just inside from this entry. I observed, as I testified before, these bags of sugar were on my right, and the dolly containing bags of sugar on it, that is in the photograph right here.

Mr. MARKLE. The next photograph that the witness makes reference to, for the record, is Government's Exhibit 13, if the Court please.

[fol. 239] The WITNESS. Continuing straight ahead, on that previous photograph, I observed this refrigerator, which I believe was a Nash-Kelvinator, and spoke of a small plywood section which I observed as I came through the doorway.

This is the steam boiler. In front of it, is the oil burner.

This is the switch that Mr. Romano directed me to turn off, in order to turn off the boiler.

This pipe that you see rising on the second floor is the asbesto tile-like pipe that was being used as a flue, a chimney, a heat vent, or whatever it was.

Mr. MARKLE. Where did that lead, if you observed it?

The WITNESS. That led to the second floor, sir, and through the second floor.

Mr. MARKLE. Through the second floor?

The WITNESS. Yes, sir.

Mr. MARKLE. All right, go ahead.

The WITNESS. It doesn't show too clearly in this picture, but there are water lines and steam lines leading directly to the cooker and—

Mr. MARKLE. You indicate the water line as being, for the record, the line in the middle of the picture, in approximately three-quarters ways up the picture; is that right?

The WITNESS. Yes, that's correct.

Mr. MARKLE. And the other line which you described?

The WITNESS. Was the return line.

Mr. MARKLE. That is about a quarter of an inch from the top of the picture; is that correct?

The WITNESS. That's correct. Then, this doorway, which was directly in front of me, as I entered through the vent, this waste pipe, which I found to be a waste pipe, led out through this doorway.

[fol. 240] Mr. MARKLE. For the record, may that indicate, if the Court please, that just to the right of the doorway, and about one-half way up the picture.

The WITNESS. I found empty 60-pound Domino brand sugar bags in these piles, as you see them.

Mr. MARKLE. May the record indicate, if the Court please, to the right of the picture, the witness is pointing to bags to the right of the picture.

The WITNESS. This object that you see here is a motor —I believe it is a Westinghouse one-quarter motor, and an electric fan, and exhaust fan, which was in the window—in this window here, of the still premises.

Mr. MARKLE. Again for the record, if the Court please, he points to a fan which is on the left-hand side—or a motor on the left-hand side of the picture, or a wooden platform, and placed in the window. For the record.

The next picture is Government's Exhibit 14.

The WITNESS. This is a picture of an oil burner—

THE COURT. Excuse me, what was the last one?

Mr. MARKLE. The last one, if the Court please, was number 13.

The WITNESS. This is a picture of a Nuway oil burner, a gun-type oil burner, which I observed, and heard and saw in operation, in this steam boiler, at the moment of

my entry. You can see here just the beginning of the asbestos tile-like flue, or chimney, or heat vent, connecting to the floor.

Mr. MARKLE. For the record, Mr. Nadel points to the left-hand corner of the picture, the upper left-hand corner, and there would be what appears to be a white piping going up.

The next exhibit, if the Court please, is Government's Exhibit Number 17.

The WITNESS. On examination of the refrigerator, which is one of the previous exhibits, I opened it, and I found these two cartons to be full of a substance, which on examination, by odor and taste, I found to be yeast.

[fol. 241] By Mr. Markle:

Q. You described the contents as being a vodka box, marked "Vodka," in the picture, and the others as Manischevitz quarts; is that correct? A. That's correct.

Mr. FLYNN. They contained yeast.

A. This object that you see here is the plywood partition that I spoke of that I saw.

By Mr. Markle:

Q. That is in the middle, three-quarters of the way going to the right; is that correct? A. The object on the other side of it is a sanitary bowl that I spoke of. This was in a northerly—rather the westerly. All these objects that I spoke of you could call along the westerly end of the building.

Q. For the record, this is Government's Exhibit 24 and is the next exhibit referred to. A. In going in a easterly fashion in this room along what would probably be the northerly wall, that picture showing the doorway which was immediately in front of me, as I entered the premises, on opening it, I found this pipe which I subsequently found to be the waste pipe.

Q. That pipe is indicated on the right-hand side of the picture, what appears to be a silver or white pipe? A. Leads out through this area that appears darker in

the middle of the photograph, and I observed a section of the pipe leading out into the water itself.

Q. For the record, I might indicate that that is Exhibit 23.

* * * *

Mr. MARKLE. Government's Exhibit 22 is the next exhibit, if the Court please.

A. (Continuing) These are the bags that I observed in the middle of the floor as I entered near a trap door. [fol. 242] I put the ladder down through the trap door and went underneath the trap door to examine the exhaust vent or waste pipe in the previous picture.

Mr. CALVOCORESSI. I move it be stricken—same objection.

Mr. MARKLE. I claim it. I am asking him what, if anything, he did with relation to these pictures, and what he did in relation to these pictures to give an accurate representation of what this means to the jury. If the objection is that I didn't ask him, I will ask him.

Q. What, if anything, concerning Government's Exhibit 22, did you do concerning that which purports to be a trap door?

Mr. FLYNN. I object to that question. These were offered as fair and reasonable representations of the conditions as they found it, as he arrived on the premises, not what he did to the premises after he got there.

The COURT. Well, these pictures are being offered. While they are being offered, the Court will suggest that the witness describe what the picture contains. Then if you want to draw further evidence from the witness, you may do so and refer to the pictures at that time. I think we will make better progress.

Mr. MARKLE. Yes, sir.

Q. Mr. Nadel, first on Government's Exhibit 22, would you state what is represented on that picture? A. This is a trap door with several bags of substance I observed on the floor of the still premises.

Q. The next exhibit is Government's Exhibit 20. A. Still going in an easterly direction on the northerly wall, these pipe lines here, these two pipe lines, the lower of the

two pipe lines, are waste lines. The pipe line, the upper of the pipe lines, are steam lines from a steam boiler.

Q. Is that the one in the middle and the one going up? A. Yes.

[fol. 243] Q. They are the steam lines; is that correct? A. That's correct, sir.

Q. Referring to Government's Exhibit 21, would you explain to the ladies and gentlemen what that represents as observed by you? A. This is a continuation of the lines.

Q. What lines? A. Of the steam lines, and this is what is known to me as a steam trapping condenser.

Q. That is in the middle of the picture; is that correct, the box-type like object? A. That's correct.

Mr. CALVOCORESSI. May I inquire, so that I will understand? I think the word, "Condenser," was used before in the testimony.

By Mr. Calvocoressi:

Q. Are you talking of the same condenser? A. No, sir, I am coming to that.

Mr. CALVOCORESSI. Thank you.

Mr. FLYNN. May I inquire, then, your Honor, if the witness is referring to the box as a steam trap? He has defined it both ways.

By Mr. Flynn:

Q. Is it a steam trap? A. That is what it is known to me as.

By the Court:

Q. Do I understand that a steam trap and steam condenser have the same meaning? A. Basically, they are the same, as is my understanding of it, but it has been defined to me as a steam trap.

[fol. 244] By Mr. Markle:

Q. Directing your attention now to Government's Exhibit 19, what does that purport to show, please? A.

This shows a continuation of this line leading from my left to the right.

Q. So that the record will not be confused, to a person looking at it, leading from the right to the left; is that correct? A. This line, this particular line, leads from the mash vats or fermenters. This particular line is a waste line.

Q. So that the record is clear, you refer to the lower line? A. The lower line on the left; that's correct. This series of pipes lead through the pipe to the cooker. This is the cooker or still body.

Q. Just for the record, you refer to a T-shape pipe line leading to the cooker body as being the steam line; is that correct, or what? A. This is a line leading from a mash vat to the cooker.

Q. And the large boiler-type is the still body? A. Is the still body. These valves control the flow of the material from this line. The valve would operate it to the exhaust. The valve would allow it to go into the mash body.

Q. The lower valve would allow the exhaust, and the upper valve would allow it to go into the still body; is that correct? A. These are steam lines coming from the steam boiler.

Q. You have reference there to two small lines on the left-hand side of the picture; is that correct? A. This is a small electric pump.

Q. And that appears to the left of the picture again? A. That's correct, sir. And this is another waste line coming from the still body.

Q. And that runs behind the pump; is that correct? A. Yes.

Q. Calling your attention to Government's Exhibit 8, what does that show?

Mr. CALVOCORESSI. What is the number on that?

Mr. MARKLE. Eight.

[fol. 245] There are three collars on this still body; the first collar had the still columns that I spoke of. This is the left-hand column as it was facing me. This is the right-hand column.

There are three collars on this still body; the first collar had a plate with a gauge on it; the second column had a pipe running up through the floor.

There was an aperture with pipes coming down from the second floor.

Mr. CALVOCORESSI. Excuse me. I can't hear the witness.

By Mr. Calvocoressi:

Q. Did you say a collar or a column on this? A. These had steel body collars, but these are columns.

Mr. CALVOCORESSI. Thank you.

By Mr. Markle:

Q. Directing your attention to Government's Exhibit 9, what does that show, Mr. Nadel, as observed by you? A. Through the aperture or hole in the previous picture, this shows the connection, the pipes conecting the still column to this object here with return pipes down to the first floor. These pipes are all copper.

Q. Directing your attention to Government's Exhibit 10, what does that purport to show, or what does it show? A. This is a full picture showing the apertures of the hole from the first floor with a connecting pipe, and this is a copper dephlegmator. And this is the return pipe from the dephlegmator.

Now, going downstairs. And this object is one section of asbestos-like pipe that I found on the floor near the dephlegmator. This object is known to us as a dephlegmator or a primary condenser.

[fol. 246] Q. Directing your attention now to Government's Exhibit 11, what does that show as seen by you on October 13, 1960? A. These are the return pipes. This is the pipe leading from a dephlegmator to a condenser on the first floor on a platform.

This is the ladder which I found against the wall between the condenser and the columns through which I was able to observe through the aperture the dephlegmator on the second floor.

Q. That is located in the middle of the picture on the second floor in the exhibit? A. Yes, sir.

Q. Calling your attention to Government's Exhibit 12, I will ask you what does that show as seen by you on October 13, 1960? A. This is a steel receiving tank. Up in the upper left-hand corner is the base of that silver painted condenser that you see there; and this other line is a water line, and then there is one of these pipes.

Q. You refer to a line running toward the top of the picture from right to left, as you see it? A. One of these lines is not clearly defined. It leads from that condenser to the receiving tank.

Q. Now, you point to another object in the picture. That is the receiving tank? A. That is the receiving tank.

By Mr. Flynn:

Q. Does the condenser show in there? A. (Indicating) Right there.

By Mr. Markle:

Q. Directing your attention to Government's Exhibit 7, what does that show? A. This is a full view, looking from a westerly to an easterly direction, showing the still set-up with the mash vats.

Q. Now, so that the record and the jury may understand, you refer to these objects which are to the right of the picture and appear to be large containers. Are [fol. 247] those the mash vats? A. Those are the mash vats and these were empty sugar bags, as we found them.

Q. Those are the bags marked, "Domino," and appear to be in the lower left-hand corner of the picture; is that correct? A. And then these four bags of sugar were found to be full.

Q. Those are four full bags of sugar underneath the TV set? A. Philco TV set.

Q. That appears to be in the left? A. To the left.

By Mr. Flynn:

Q. Was it by smell, taste, Mr. Nadel? A. By feel. These tins down here are five-gallon tins found at the end of the room in back of the receiving tank, or rather

as you face from the receiving tank, you face these tin cans which are five-gallon tin cans.

By Mr. Markle:

Q. Now, I would ask you what does this represent, and what does this represent? A. This is a still body and these are the still columns that are rising from the still body itself. This line leads from the mash vats and through the previous pictures, one, this particular valve operates the exhaust line or waste line, and this particular valve operates the entry into the cooker or still body.

Q. Where do these columns lead, sir? A. This leads through the floor to the dephlegmator on the second floor.

Q. And back to where? A. You cannot see on the other side.

Q. Directing your attention to Government's Exhibit 18, what does that show, Mr. Nadel? A. This shows the connection, the pipe line from the mash vats, and also shows the elevation of the mash vats. It does not show the cant or slant. And this was a full bag of sugar found on the premises.

Q. You refer to the bag found in the middle? A. Yes, sir.

Q. Directing your attention to Government's Exhibit 16, what does that show, sir? A. This is the last mash [fol. 248] vat as is shown in the previous picture. To the rear or towards the side of the building, through which I entered at the furthermost end, were stacked these empty tin cans and these cartons, which on examination of some, I found to contain empty one-gallon glass jugs.

Q. Directing your attention to Government's Exhibit 26, I would ask you what does that show? A. The asbestos-like flue, chimney, vent, rising from alongside of the boiler on the first floor, rose through the second floor, through this section here and out the upper section of the window to the outside of the building.

Q. You point to a column in the middle of the picture; is that correct? A. That's correct, sir.

Q. Mr. Nadel, I would ask you again how many years you have had with the Alcohol Tax people? A. Over eighteen years.

Q. And I would ask you, sir, during that eighteen years, what special training, if any, you have received? A. I have attended Treasury law enforcement officer's school, the alcoholic tax inspector's school, the alcoholic tax United States storekeeper's gauger's school, the alcohol tax junior inspector's school; and I have taken correspondence courses, Department of Alcohol Tax correspondence courses, and raw materials, firearms, criminal procedures, investigative procedures, and criminal law.

Q. And do you continue to stay read up on the periodicals that are issued by your department concerning distilled spirits? A. I do, sir.

Q. And still? A. I do, sir.

* * * *

By Mr. Markle:

Q. Whether or not you stay read up in the field of alcohol tax and tobacco enforcement, law enforcement? A. I do, sir.

[fol. 249] Q. And have you had experience in the past to observe stills in operation? A. I have, sir.

Q. How many stills have you observed in operation?

Mr. FLYNN. Objection. It has no bearing.

Mr. MARKLE. I claim it, and I claim that it does.

The COURT. Do you offer it to show the experience of the witness?

Mr. MARKLE. Yes, sir.

The COURT. So that he may be offered as an expert?

Mr. MARKLE. Yes, sir, to show his experience, his credibility.

The COURT. Well, it isn't on the question of credibility.

Mr. MARKLE. Well, to show his experience in the field, and he knows what and how a still operates; and he knows the various component parts and, that he has observed them on prior experiences.

The COURT. Very well.

Mr. MARKLE. Will you read the question.

The COURT. Why don't you withdraw it and rephrase it in the light of that amendment.

Q. Mr. Nadel, based upon your experience as an officer have you had experience in seeing in operation stills, prior to this still in question? A. Yes, sir.

Q. Have you also had occasion to observe legal distilleries in operation prior to this operation? A. I have, sir.

Q. Was that while you were employed as a gauger? A. That's correct, sir.

Q. By the treasury department? A. By the alcohol and tobacco tax division.

Q. How many stills would you estimate that you have seen in your years with the alcohol tax division, roughly? A. No less than a hundred, sir.

Q. Based upon your experience with the alcohol tobacco and tax division, and your special training, your observa-
[fol. 250] tion of the still on October 13, 1960, was this still in operation? A. The still was in operation, sir.

Q. Based upon your experience, your special training and your observation—I will withdraw the question.

What, if anything, did you observe in the fermenting vats—describe it?

Mr. FLYNN. I object to that.

The COURT. Will you state your objection?

Mr. FLYNN. It is repetitious. The witness has already testified as to what he found in the vats.

Mr. MARKLE. Well, if there is no question that it was mash—

Mr. FLYNN. He already testified that there was in eight of them and nothing in the ninth.

The COURT. Unless counsel wants it particularized, how much, what other conditions he observed in each vat. I think it has been brought out that counsel may present his case in his own manner.

Q. Would you describe what you found in the fermenting vats? A. I found mash.

Mr. FLYNN. I object on the ground that it is repetitious.

The COURT. If that is the only ground, the objection is overruled.

A. (Continuing) I found eight of the vats to contain mash in various stages of fermentation, and on examina-

tion, by look, smell and feel, and subsequently when the mash was dunked, I found the mash to be of sugar, molasses, and water composition, and yeast.

Q. Based on your experience with the alcohol tobacco and tax division, your special training, your observation of the still on October 13, 1960, was it producing distilled spirits?

Mr. FLYNN. Objection.

Mr. MARKLE. Claim it.

[fol. 251] Mr. FLYNN. It makes a big difference between whether or not it was producing some substance and whether or not it was producing "distilled spirits." I think the witness has testified, your Honor, that this whole piece of machinery was in operation. Since he has described that, the Court has permitted him to refer to these premises as distilled premises. I don't think there is any question in anyone's mind that this was a still.

The COURT. Can counsel for the defendants agree that what we are talking about here, with the evidence so far disclosed, that there is a still in existence?

Mr. FLYNN. We would be foolhearty to deny it, sir.

Mr. CALVOCORESSI. There is no objection to so stipulate, your Honor, on our part.

The COURT. Mr. Caplan?

Mr. CAPLAN. I wouldn't know, if I saw one, but I will take the Government's word for it.

The COURT. Very well.

Q. Was the still on the premises producing distilled spirits, based on your experience in the field and with the alcohol tax department, your observation, your special training, and your observation of the premises on October 13, 1960? A. Yes, sir.

(Pause)

The COURT. Just a moment. It there an objection?

Mr. FLYNN. There is an objection, your Honor. It is the same question to which I objected to before. It seems perfectly proper to ask him if it was in operation. He asked him, and he said it was, and it would be perfectly proper to ask him if it was a still based on his training

and experience, and he said it is. What was producing, what it was producing, he is not qualified to testify to.

The COURT. Isn't it true, counsellor, that he might not be able to testify whether or not it was producing spirits greater than one half of one per cent alcohol con-
[fol. 252] tent, which the law refers to? Counsel admits that it was a still. Aren't we fencing with straws on this point?

Mr. FLYNN. I don't think we are, your Honor. It could be a very important part of the entire prosecution. I do not consider it a minute point.

The COURT. The Court will overrule the objection and the witness may answer, subject to cross-examination by counsel.

A. Yes, sir.

Q. While on the premises whether or not you took sample from the eight fermenting vats? A. I did, sir.

Q. From the still body? A. I took a sample with Investigator Shaw, and Investigator Hogan, from each of the eight vats which I found to contain mash, and a sample from the still body which, when I examined it, I found it to be full of fermenting mash. And I then, with the same investigators, took a composite sample of the mash in the eight fermenters which I found to contain mash.

Mr. FLYNN. I wonder if I might have that entire answer read?

The Court. Yes.

(The last answer was read.)

Q. What, if anythnig, did you do with those samples as taken from you at that time? A. With Investigator Shaw and Hogan, those samples that I assisted in the taking thereof, I sealed them with Treasury Department form 1674 and with Treasury Department form 1492 number—may I refresh my memory so I can give you the correct numbers?

Mr. FLYNN. May the record reflect that the witness is referring to some notes that he took from the left rear pocket, your Honor?

The COURT. The record may so disclose. I take it that it was the right hip pocket.

[fol. 253] Mr. FLYNN. It is right for me, but if he reaches with his left, it would be left to him, sir.

The COURT. Very well.

A. (Continuing) The composite sample, one gallon of mash, according to my notes, was labelled with Treasury Department form 1492, number 123751 and 123752 to 759, with samples of mash taken from six mash vats, which for the sake of identification we called numbers one to six, running in a west to easterly direction in the room. They were not physically numbered.

Number 7 vat was the empty vat.

By Mr. Flynn:

Q. Number 7 was the empty vat? A. Number 7 was the empty vat. Vats 8 and 9 also the samples were included in it, and those labels 123752 to 123759 inclusive.

Mr. CAPLAN. Your Honor, then I ask that his previous testimony go out. He is got eight—let me understand.

By Mr. Caplan:

Q. The last two vats, were they included in these tags 752 through 759? A. That's right, sir.

Mr. CAPLAN. I beg your pardon.

By Mr. Markle:

Q. And what, if anything, was done, to your knowledge, with those samples as taken then? A. They were taken into custody by Investigator Shaw in my presence on October 13, 1960.

Q. And where were they taken to? A. They were maintained in his presence.

Mr. FLYNN. Objected to.

Q. If you know.

Mr. FLYNN. If they were tendered to someone else and taken to someplace, I think that witness would have to qualify what he did with them.

[fol. 254] Mr. MARKLE. I want to qualify if he knows.

The COURT. Well, was done in his presence?

Mr. MARKLE. Yes, sir.

By Mr. Markle:

Q. In your presence, and if you know? A. On October 17, 1961—1960 at New Haven sub-office of the Alcohol and Tobacco Tax Division, Investigator Shaw delivered it to my custody, seventeen samples bearing Treasury Department labels numbers 123751 to 123767 inclusive, which included the samples that I assisted in the taking thereof.

By the Court:

Q. Excuse me, I didn't get that last number. A. I'm sorry, sir. It is 123767.

Mr. CAPLAN. I don't think that answer is responsive to the question. He started by saying he had given these nine samples which he had previously discussed to Mr. Shaw, and then we have a gap of four or five days. I don't think the answer is responsive to what Mr. Markle asked him. And, of course, we have a lot more samples now. We have seventeen samples as Shaw gave him on the 17th as opposed to the nine samples he previously discussed.

The COURT. I think the point is well taken. Previously, the numbers of these samples went as far as 123759. Now, they go beyond 759 to 123767.

Mr. MARKLE. I am tracing the chain of custody from Mr. Nadel to Mr. Shaw back to Mr. Nadel, and I will tie it in, I represent to the Court, by bringing in Mr. Shaw to tie in the four days and what took place.

I want to show this by this man rather than have him go off and come back again.

[fol. 255] The COURT. Wouldn't it be well to first ascertain whether he gave him back the first sample that he testified to and then in addition thereto, certain other samples that were given to him, and then through some other witness, offer that?

Mr. Markle. Yes, sir.

By Mr. Markle:

Q. I would ask you whether or not the first samples that you delivered to Mr. Shaw, and which you have pre-

viously testified to, were returned to you on October 17th at the New Haven Office? A. They were.

Q. And by whom? A. By Investigator John J. Shaw.

Q. And at this time, on October 17th, I would ask you whether or not you received other samples, or what, if anything else you received from Mr. Shaw? A. I received, in addition to the other samples—

Mr. FLYNN. May the record reflect that the witness is checking that same notebook, your Honor?

The COURT. It may.

A. (Continuing) I received a total of seventeen samples including those that I referred to before, bearing sample label numbers Treasury Department form 1492, running from 123751 to 123767 inclusive.

Mr. MARKEL. I note that it is five minutes to 1:00 and I am about to start a new line of questioning, and I wonder if we could suspend at this time?

* * * *

[fol. 256] Afternoon Session

* * * *

(The jury was seated.)

By Mr. Markle:

Q. Mr. Nadel, whether or not on October 13, 1960, you had occasion to examine the outside of the premises? A. I did.

Q. And what, if anything, did you find on the outside of the premises, as observed by you on October 13, 1960? A. In going around that portion of the Aspinook Mill building, which housed the still premises, I observed on the riverside, on the Quinnebaug Riverside, which is the north westerly side of these particular premises, a galvanized section of pipe, or smoke-stack coming out of the second story window—I believe it was the second story window—from the corner, the northwest corner. Said section of galvanized pipe extended up the outside portion of the building, up to about the middle of the second window on the third story of the same building.

I also examined all sides of the building, and no wheres on the building, on the outside of the building that I observed, did I observe any sign indicating that it housed a duly-authorized distillery.

Q. With reference to that, Mr. Nadel, whether or not there is a section of the statute applicable to that? A. There is, sir.

Q. What section is that? A. Section 5180.

[fol. 257] Q. Is that of the Internal Revenue Code? A. Title 26, and, the Internal Revenue Code, sir.

Q. What, if anything, does that require, sir?

Mr. FLYNN. Oh no.

Mr. MARKLE. I ask the Court to take judicial notice of that, that section.

The COURT. 5180?

Mr. MARKLE. Yes, sir.

The COURT. Is the sub-section claimed? Is that the entire section?

Mr. MARKLE. May I see the slip? Section 5180, Title 26, if the Court please. I ask that the Court take judicial notice of the fact that it requires a sign.

By Mr. Markle:

Q. Now, Mr. Nadel, what, if anything, was done with the materials that were seized on the still premises, if you know? A. On October 16, 1960, at about 3:30 p.m., that portion of the seizure which was not destroyed * * * was delivered into my custody by Investigator Shaw, who executed the search warrant for the still premises. On the same date Investigator Sullivan took custody of the seized 1960 Ford green van truck, bearing 1960 Rhode Island registration, commercial, 2703, together with 41 bags—60 pound bags of sugar, bearing the brand name Domino, together with twelve five gallon empty tin cans, and two cardboard cartons containing four one gallon empty glass jugs.

The remainder of the undestroyed portion of the seizure was taken in my custody and under my control, and conveyed in trucks from Jewett City to Hartford, Connecticut, where at about 5:30 p.m. on October 16, I delivered

—October 16, 1960—I delivered this portion of the seizure into the custody of the then supervisor in charge, John E. Norton.

* * * *

[fol. 258] By Mr. Markle:

Q. And, Mr. Nadel, as to the remainder of the seized property, where was that taken? A. It was taken to the storage vault in the main post office building here in Hartford, Connecticut.

Q. And, who was in charge of that on October 14, 15 and 16? A. On October 16, 1960, Mr. John E. Norton was supervisor in charge.

Q. And subsequent to that date, did you come into custody of that material? A. I did. On March 24, 1962 I took custody of all seized property, including that property seized October 13, 1960.

Q. Is that by virtue of your new position? A. That's correct, sir.

Q. And is that under your custody and control as of this date? A. It is, sir.

Q. And has it remained so until the date of this trial? A. It does, sir.

Q. From March 24, 1962 until this date? A. That's correct, sir.

Q. And I will ask you as to the chemical—question withdrawn.

As to the samples taken from the various portions of the still—I have reference now to liquid samples and also any other samples that were taken for analysis; did you initial those samples? A. I did, sir.

Q. And were they retained in your custody, or someone else's? A. I retained custody of the seventeen samples of evidence turned over to me.

Mr. FLYNN. That is objected to. Your Honor, this witness testified that he took nine samples; he received some other objects that apparently were taken by some-
[fol. 259] one else. In my judgment it would be improper for him to discuss what he did without first getting the other samples identified, as to where they were taken, and by whom they were taken.

The COURT. The point is well-taken. Counsel will proceed on that basis, setting up how they were taken, the type of container they were taken in, whether or not they were sealed; how they were identified.

By Mr. Markle:

Q. All right, I will direct your attention, Mr. Nadel, to October 13, 1960, and whether or not you know how the samples were taken. First, directing your attention to the samples on which your initials appear. A. The samples that were taken on October 13, 1960 at Jewett City, the nine that I spoke of, bore treasury department form 1492, label numbers 123751 to 123759, inclusive. And, also 123760, were samples that I personally assisted in the taking thereof, and they were taken into custody in my presence by Investigator John J. Shaw.

Q. How were they taken, sir? A. The mash samples were taken in a one-pint sample. We have a syringe, which we use. The first thing to be done in a mash vat, or a barrel—whichever the case may be, depending on the size of the operation, would be to muddle, or mix the mash, to make certain that the sample that you are taking is a good sample, which was done in each one of these eight vats that contained mash.

We then put the syringe in there, in the middle, or as close to the middle of the vat as possible, and we fill up the bottle of mash.

In this case they were pints samples. In a case of a gallon composite sample, we tried to take an equal amount from each vat in the same manner. The tenth sample that I spoke of was a gallon sample of the uncolored liquid, which had the odor and aroma of distilled spirits alcohol.

[fol. 260] A small amount was taken from each of the twenty-four tins, five gallon tins, containing said liquid, plus a small portion of the one gallon glass jug that was about three-quarters full of the uncolored liquid that had the aroma and characteristic normally associated with distilled spirits alcohol.

The other samples, as the individual investigators would report to me the results of their work, I would order them to take samples.

I did not see the samples being taken. I did order Investigator Rourke to take samples of the raw materials that were found. I did order that samples be taken from the still columns when they were dismantled.

I did order that an additional larger composite sample be taken from the 120 and three quarter gallons of uncolored liquid, which had the distinctive aroma of distilled spirits alcohol. And, this was done.

Q. How were these samples sealed, if you know? A. These samples were sealed in accordance with my instructions, properly with form 1674, Treasury Department form 1674, and Treasury Department form 1492, running in number from 123761 to 123767.

These objects bearing those label numbers were turned over to me by Investigator Shaw at the New Haven sub-office on October 17, 1960.

I retained these objects, which included the ten samples that I had assisted in taking, which ran in numbers—and these objects had label numbers, Treasury Department labels 123751 to 123767. These seventeen objects were retained in my custody until October 20, 1960, when I delivered into the custody of Investigator Sushman, Samuel Sushman, these seventeen objects bearing Treasury Department labels 1492, form numbers, 123751 to 123767, inclusive, and also having affixed to them Treasury Department form 1674.

[fol. 261] At that time, at the New Haven sub-office, I instructed Investigator Sushman to take these seventeen objects, being so-labelled, and so-numbered, and deliver them that date to the custody of the U.S. Chemist at Boston, Massachusetts.

Q. How were these samples identified by the individual persons? A. I also required that—and, I instructed each investigator who took a sample to make certain it was properly identified, and to bear his initials.

Then I took custody of all these samples, which I took custody of all these objects, bearing these label numbers. I write my initials on each of the labels affixed to each of

the objects, so that I might identify them as those objects which were delivered to me by Investigator Shaw.

Q. Do you have those objects here today? A. They are in the custody of the United States Chemist, who to my knowledge is next door.

* * * *

By Mr. Markle:

Q. Well, whether or not you made, Mr. Nadel, any calculations of the theoretical production of the still? A. I did, sir.

* * * *

Q. What is the formula that you used, Mr. Nadel? A. A capacity of the—the total mash capacity in all fermenters divided by the fermenting cycle of the particular mash, multiplied by the proof or the alcoholic content that you would know as proof, the alcoholic content of the ripe mash, multiplying that figure by two, will give you the proof gallonage, the average, rather the daily production capacity in proof gallons of any illicit still—I'm sorry —any distillery.

[fol. 262] Mr. FLYNN. I missed a part of it; may I ask that the stenographer read the answer back?

The COURT. Yes.

(Last answer read.)

Q. Were you able to form an opinion based upon your observations, and what, if anything, you did on the premises in question as to the production capacity of the still?

Mr. FLYNN. That is objected to.

Mr. MARKLE. That can be answered yes or no. A. Yes, sir.

Mr. FLYNN. I will object to the question even being posed. Your Honor has asked that the witness be qualified. We now find that we have a fermenting cycle. Mr. Caplan has previously pointed out to the Court that this might in large part depend upon some product. I don't know anything about this, the capacity of the container, how many hours it had been sitting. None of it has been put in as a foundation to give the capacity of the distillation.

The COURT. The point is well taken.

Q. What, if anything, did you do in relation to the formula, then? Relate it step by step as to the formula and as to how or what you did or observed? A. I made a computation of the mash vats to determine the type of mash it was. I found, as I previously testified, that it was a mash composed of sugar, molasses, yeast, and water.

From the physical layout and the fact that it was indoors, and based on my years of experience, I found that it was a three-day fermenting cycle, on the date that the mash would be first set to the day that it would be fit for distillation, or what we call ripe mash.

Using that three-day fermenting cycle as the basis, I then applied the formula that I explained so far.

[fol. 263] The capacity of the mash vats was determined by actual cubic content prior to the application of the formula and the United States chemist's report to us, to my office, as a result of his analysis.

Mr. FLYNN. Objection.

The COURT. Sustained as to that part of the question.

Q. As a result of some information obtained by you, did you come to the conclusion as to what the alcoholic content was? A. I did.

Q. Did you utilize that in the formula? A. I did, based on the information.

Mr. FLYNN. There is no question pending.

Mr. MARKLE. There is a question pending in that I asked him to explain to the Court and the ladies and gentlemen of the jury what, if anything, he did. There was an objection, and I thought I cleared the objection, and he was proceeding to relate how he applied the formula to his actual experience, what he actually observed and noted.

The COURT. Rephrase the question.

Q. What else, if anything, did you do in relation to that formula that you have given us to come to the opinion or conclusion that you have reached? A. I applied that formula to the figures that I had arrived at, based on my observations and experience as Jewett City.

Q. And did you form an opinion? A. I did, sir.

Q. And I will ask you what that opinion was?

Mr. FLYNN. Now, your Honor, before he answers that, the witness is not an expert chemist. One of the conditions of the application of the formula is that he have evidence in to establish, and as I understand it, the proof content of the net product. Secondly, he uses, based upon his experience in the field, he reaches a mathematical conclusion as to daily capacity. I think that there would [fol. 264] have to be some foundation as to his experience with apparatus of a similar type and size.

There is no evidence, as I understand, as to what he said so far, that there has been any evidence as to the actual content of each of these vats to the content at or about the time. We are dealing with an ethereal thing at the optimum potential capacity. It is immaterial and irrelevant in addition to not being properly qualified.

The COURT. Do you propose to offer a chemist as a witness here, counsel?

Mr. MARKLE. I do, if the Court please.

The COURT. Will the chemist testimony include the proof content of the end product which the witness has testified to was given to him for a test?

Mr. MARKLE. It will, if the Court please.

The COURT. His test being an essential part of the witness' opinion, any testimony now with respect to his opinion based upon the chemist's test would have to be offered, counselor, upon your offering the chemist to verify the basis for this computation as to proof of the liquid.

Mr. MARKLE. Yes, sir. And I would make that representation, that I intend to offer the chemist in that capacity to show the proof of what was obtained from the samples.

Mr. CALVOCORESSI. May I ask your Honor if the chemist will also testify as to the proof of the mash, which I suppose is another chemical analysis?

Mr. MARKLE. The chemist will testify as to the proof of the mash.

The COURT. On the condition that the Government will offer evidence through the chemist as to the proof of the mash and proof of the end product—at least the latter is [fol. 265] essential to the computation made by the wit-

ness—the court will allow the witness to express an opinion.

Mr. FLYNN. My objection has been noted and overruled?

* * * *

By Mr. Markle:

Q. Mr. Nadel, I would ask you to look at the contents of the two boxes, and also the tin container, and ask you whether or not your initials appear thereon? Is your answer yes? A. Yes, my initials are on each and every one of those objects.

Mr. MARKLE. May they then be marked for identification, your Honor?

The COURT. Will you bring them to the Clerk's bench so that they may be properly marked for identification?

Mr. MARKLE. Yes, sir.

Mr. CAPLAN. May I ask one question?

By Mr. Caplan:

Q. These pint samples, is it significant that they are in Old Mr. Boston bottles? A. No, they are not in Old Mr. Boston bottles. They have the caps. We just have, happened to have some caps.

Q. It is not Old Mr. Boston? A. Oh, no. For the Court's information, we picked these caps up.

Mr. MARKLE. If the Court please, for the record, might it be noted that Government's Exhibit 27 for Identification is a tin, five-gallon container?

Mr. CALVOCORESSI. May I inquire: Is the exhibit, the container which I see here, or the contents, or both?

Mr. MARKLE. Contents thereof.

[fol. 266] Mr. CALVOCORESSI. Just the contents?

Mr. MARKLE. Yes.

The COURT. Is the number appearing thereon, does it coincide with any of the numbers that the witness referred to as having been taken in his presence, or by Mr. Shaw, so that they may be identified?

Mr. MARKLE. I believe it does.

By Mr. Markle:

Q. It does, doesn't it, Mr. Nadel? Directing your attention to the label. A. That was taken by Investigator Shaw and Sushman, and bears my initials.

By the Court:

Q. Will you state, for the record, the number? A. 123765, form 1492.

The COURT. Thank you.

(Government's Exhibit 27 for Identification: Five-gallon container.)

Mr. MARKLE. For the record, if the Court please, I will enter the box with the contents thereof. It is marked, "Four-fifths of a quart," on the outside, brown box, and it contains two-one gallon containers, the first one bearing the number label 123760.

The COURT. I might suggest, counselor, that it might be better, because some of these tests may ultimately be subject to question as to what vat they came from, and what test was made, so if there were admitted as separate Government exhibits, these particular ones, in accordance with the numbers given by the inspector originally, it might prevent confusion later on.

Mr. MARKLE. All right, sir.

[fol. 267] By Mr. Markle:

Q. Would you identify, if you can, from what vat that was taken from? A. This was composite sample taken from 120 gallons and three-quarter gallons of the colorless liquid which were found on the premises that had the characteristics of distilled spirits alcohol.

Q. That bears number 123760? A. That's right.

Q. And was this in your possession? A. It was, sir.

Q. Do your initials appear thereon? A. It does, sir.

Mr. CALVOCORESSI. Is this again offered simply for content and the container is incidental?

Mr. MARKLE. Yes, nothing as to the container.

(Government's Exhibit 28 for Identification: Container.)

The COURT. For the record, gentlemen, this jug in which the colorless liquid is contained is not one of the jugs that you referred to in your testimony, this is a separate container?

The WITNESS. No, sir.

The COURT. Will you describe that, please?

The WITNESS. That last jug is one of those glass jugs found on the premises, at Jewett City, October 13, 1960.

The COURT. So you claim the glass jug as well as the contents?

The WITNESS. Yes.

Mr. MARKLE. I do, sir.

Mr. CALVOCORESSI. All right.

By Mr. Markle:

Q. I show you a one-gallon jug containing a brown liquid bearing number 123751. Where was that taken from? A. That is a gallon composite sample of mash taken from the eighth fermenting vat containing mash at Jewett City.

Q. Was this in your possession? A. That was, sir, yes.

[fol. 268] Q. And do your initials appear thereon? A. They do right there.

Mr. FLYNN. What is the corresponding identification number?

Mr. MARKLE. 123751. (Gov't. Ex. 29 for Iden.)

Mr. FLYNN. Contents and jug?

Mr. MARKLE. Contents and jug I offer.

The COURT. Does that include the labelling on it that says, "Poison"?

Mr. MARKLE. Well, no, I don't claim that on there.

Mr. FLYNN. You don't claim that?

Mr. CAPLAN. These are all for identification?

Mr. MARKLE. For identification.

If the Court please, if there is no objection, there is this large box containing thirteen bottles, and I would offer them. It might be easier for the convenience of the Clerk in storing this thing if I offered them as one, but identified by numbers.

The COURT. Do they have separate numbers?

Mr. MARKLE. Yes, each one has its own number.

The COURT. If they were tested separately by the chemist, I think they should be marked as separate exhibits.

Mr. CALVOCORESSI. They would have no objection if they were identified as a group.

The COURT. It may be that later during the chemist's testimony, or cross-examination, it may become of importance as to the test.

Mr. CALVOCORESSI. But just as to the witness' identification of these objects, samples, that he took, or that were given to him by others, as he testified.

The COURT. But for identification purposes, I think we should establish a firm basis. We might have each bottle identified as separate exhibits.

[fol. 269] By Mr. Markle:

Q. Showing you a bottle bearing number 123752, whether or not your initials appear thereon? A. It does.

Q. And is that a one-quart bottle—a one-pint bottle? A. That is a one-pint bottle.

Q. Where was that taken from? A. That was taken from the mash fermenter vat that we numbered or called number 1 for identification purposes. Those vats ran in a west to easterly direction.

By Mr. Caplan:

Q. Mr. Nadel, were these seals on these caps? A. Those papers clinging to the side near the neck-band are form 1674 neck seals.

Mr. CAPLAN. There seems to be wax on some of these seals.

By Mr. Caplan:

Q. The seal has been broken? A. They were broken by the chemist, sir.

Q. Since the chemist has had them, the seal has been off? A. As far as I know.

Q. And you don't know whether the chemist added something or took something out of the sample? A. I can't testify to the chemist.

By Mr. Markle:

Q. Directing your attention to a one-pint bottle bearing the legend 123753, I ask you whether or not you can identify the contents thereof? A. Yes, sir.

Q. Where was that taken? A. That was taken from mash vat number two.

Q. And that number is 123753? A. Yes.

Mr. MARKLE. For the record, the bottle bearing the number 123752 is Government's Exhibit 30.

[fol. 270] (Government's Exhibit 30 for Identification: Bottle number 123752.)

Mr. MARKLE. And the one-pint bottle bearing the number 123753 is Government's Exhibit 31 for Identificatiton.

(Government's Exhibit 31 for Identification: Bottle bearing number 123753.)

Q. I next show you bottle 123754 and ask you whether or not you can identify the same? A. I can, sir. That is my initials there, and it was taken from mash vat number three.

Mr. MARKLE. Number 123754 is marked Government's Exhibit 32 for Identification.

(Government's Exhibit 32 for Identification: Bottle bearing number 123754.)

Mr. CAPLAN. As to myself, I would save time. I would assume Mr. Nadel will identify his initials on all these bottles in sequence. They come from the various vats, and let them be marked and not have to go through this tortuous thing step by step.

The COURT. Sometimes the long way is the better way.

Q. I show you this bottle bearing the legend 123—if you can make out the rest. A. 123764.

Q. And ask you whether or not you can tell me where that came from?

Mr. FLYNN. Objection. The witness didn't take 123764.

Q. Did this come into your custody? A. It did, sir. It bears my initials.

Mr. MARKLE. That would be 33 for Identification, for the record.

(Government's Exhibit 33 for Identification: Bottle bearing number 123764.)

Q. I next show you a bottle bearing legend 123757. A. Yes, sir; this bears my initials and that came from mash vat number six.

[fol. 271] Mr. MARKLE. That would be Government's Exhibit 34 for Identification.

(Government's Exhibit 34 for Identification: Bottle bearing number 123757.)

Q. I next show you, sir, a bottle bearing number 123756. A. That bears my initials and came from mash vat number five.

Mr. MARKLE. The bottle bearing the number 123756 will be Government's Exhibit 35.

(Government's Exhibit 35 for Identification: Bottle bearing number 123756.)

Q. I show you a bottle bearing 123755, and ask you whether or not you can identify that bottle and tell me where it came from? A. Those are my initials and that came from mash vat number four.

Mr. MARKLE. Bottle bearing number 123755, being a one-pint bottle, would be Exhibit 36.

(Government's Exhibit 36 for Identification: Bottle bearing number 123755.)

Q. I show you bottle 123758 and ask you whether or not you can identify from where that came? A. Yes, sir. Those are my initials, and that came from mash vat number eight.

Mr. MARKLE. Bottle bearing number 123758 would be Government's Exhibit 37 for Identification.

(Government's Exhibit 37 for Identification: Bottle bearing number 123758.)

Q. I show you bottle bearing number 123759, and ask you whether or not these are your initials appearing thereon, and if you know where that came from? A. Those are my initials, and they came from mash vat number nine.

Mr. MARKLE. The one-pint bottle bearing 123759 I offer as Government's Exhibit 38 for Identification.

(Government's Exhibit 38 for Identification: Bottle bearing number 123759.)

[fol. 272] Q. I show you, sir, bottle 123761 and ask you whether or not you can identify that bottle? A. Yes, sir, those are my initials there.

Q. And from where was that taken? A. That sample.

By Mr. Flynn:

Q. 761? A. No, sir.

By Mr. Markle:

Q. You didn't take that? A. No.

Mr. MARKLE. I offer that for Identification, 123761.

(Government's Exhibit 39 for Identification: Bottle bearing number 123761.)

Q. I show you a broken bottle bearing legend 123762, and ask you whether or not your initials appear thereon, and ask you whether your initials are there? A. Yes, those are my initials.

Q. Do you know where this came from? A. No, sir.

Mr. MARKLE. I would offer this, if the Court please, and that would be Government's Exhibit 40 for Identification.

(Government's Exhibit 40 for Identification: Bottle bearing number 123762.)

Mr. FLYNN. Do you claim the bottle?

Mr. MARKLE. I claim the contents or what was in it, and I will bring out what happened to it.

Q. I show you another bottle bearing the legend 123763, and ask you whether or not your initials appear thereon? A. Those are my initials, sir.

Q. And whether or not you had anything to do with taking this sample? A. No, sir.

Mr. MARKLE. I offer this 123763 as Exhibit 41 for Identification.

(Government's Exhibit 41 for Identification: Bottle bearing number 123763.)

[fol. 273] Q. I show you bottle bearing legend 123766, Mr. Nadel, and ask you whether or not your initials appear thereon? A. Those are my initials.

Q. Whether or not you know where that was taken of your own knowledge? A. No, sir.

Mr. MARKLE. I offer 123766 as Government's Exhibit 42 for Identification.

(Government's Exhibit 42 for Identification: Bottle bearing number 123766.)

Q. I show you, finally, Mr. Nadel, 123767, and ask you whether your initials appear thereon? A. Those are my initials, sir.

Q. Were you present when the contents of the bottle was taken? A. No, sir.

Mr. MARKLE. I offer 123767 as Government's Exhibit 43 for Identification.

(Government's Exhibit 43 for Identification: Bottle bearing number 123767.)

The COURT. For the record, counselor, the Court would ask you to inquire as to the red seals that appear thereon entitled, "Poison." Who put them on and when they were put on.

Q. Mr. Nadel, on several of the exhibits for identification, namely, pointing your attention to Government's Exhibit 31 for Identification, there appears a red poison seal. Who placed that on the bottle? A. Those were placed on the bottle either by myself or Investigator Shaw or Hogan when those sample bottles that bear the poison labels of the samples of mash was taken.

Mr. FLYNN. Objection as to why it was put on. Just when, the question was.

The WITNESS. They were placed on October 13, 1960.

Mr. MARKLE. The question was, I think, to explain why they were put on there, and it may be that he has an objection, but I would like to be heard on it.

[fol. 274] The COURT. Well, they are offered here as exhibits and the Government did something to them. They put on a seal that says, "Poison," and we want to know who first put it on, and whether or not it is an administrative procedure. I think the jury is entitled to know that.

Mr. FLYNN. The action, certainly of the Government, to labelling something that they took would in no wise affect the guilt or innocence of any of the accused on any of the substantive counts, or the conspiracy count, and it would be a self-serving thing to identify something that appears on an exhibit for identification and then to explain the reasons for it being there.

As I recall Mr. Nadel's statement, the bottles themselves are not claimed, just the contents.

The COURT. As long as it is clear to the jury that the Government put the label on, that's all the Court is interested in. I think you will concede that.

Mr. FLYNN. Yes, sir.

Th COURT. Very well.

Mr. MARKLE. The label does appear on one in which we offer, also, the bottle.

The COURT. Very well, I think it is clear to everyone now.

Mr. MARKLE. I have no further questions.

The COURT. Are you resting with respect to the testimony of this witness?

Mr. MARKLE. Yes. I have no further questions of him.

* * * *

[fols. 275-331] * * *

[fol. 332]

Cross-Examination By Mr. Flynn:

Q. Mr. Nadel, we were discussing previously that this vehicle had just arrived at the property sometime around twenty minutes after seven in the morning of the 13th? A. Yes.

Q. Now, did your observation post tell you how many people were in that truck? A. Yes, sir.

Q. Did they tell you that the occupant of the truck went in the building? A. They did, sir.

Q. And did they tell you that they saw him use any of the keys on Government's Exhibit 2? A. No, sir.

Q. You indicated, I think, that one of these keys fitted inside the padlock? A. That's right, sir.

Q. And was that inside padlock on the hinge inside the door? A. It was on the hinge, sir.

Q. And you tested that key on the padlock that was on a hinge on the inside door? A. That's right, sir.

Q. And they never told you that whoever was driving that motor vehicle gained access by using keys to get into that building? A. No, sir.

Q. And as far as you know he did not; is that right? A. I have no knowledge of him using a key, sir.

Q. And you are not advised by anyone who was in a position to see that he used any of these keys? A. No, sir.

Q. Showing you Government's Exhibit 2. Is that right? A. That's right.

Q. Now, how many cars went down to the northwest corner? A. I believe three.

Q. And how many people in all were in those three cars, as best you can recall? A. Seven or eight.

Q. That is counting you? A. Including myself.

[fol. 333] Q. Now, you have described a series of doors to this building, and they don't appear on Government's Exhibit 5, do they—just barely? A. Barely.

Q. But they were not in that condition when you got there? A. No, sir.

Q. They were closed? A. That's right, sir.

Q. And were all eleven—pardon me. I'm sorry. I don't remember the number of them you said were with you. A. About seventeen or eighteen.

Q. No, I mean who went down to the northwest corner? A. Seven or eight.

Q. Were all seven or eight men with you, were they placed in other locations around there? A. Placed in other locations.

Q. Some of them were in another building? A. No.

Q. All of them were outside? A. Of the seven or eight men?

Q. Yes. A. They were on outside stations.

Q. And in the area of the northwest corner of the big building; is that right? A. That's right, sir.

Q. And you were directing the operation; is that correct? A. That's correct, sir.

Q. Did somebody have a document with them? A. Of what type, sir?

Q. Did somebody have a warrant of some type with them? A. Investigator Shaw had in his possession a Federal Search Warrant.

Q. When you got down to this doorway did all seven or eight of you crowd around the doorway? A. No, sir.

Q. Some stayed at the edge of the river? A. I don't know what you mean by the "edge of the river."

Q. Well, let's look at the photograph. Government's Exhibits 47 and 48 do show the west and north side of the building; do they not, sir? A. I would say so.

[fol. 334] Q. And would you point out on Government's Exhibit 47 the northwest corner of the building that you have previously been describing? A. (Indicating).

Q. That is forty-eight? A. (Indicating). This is the building.

Q. Indicating that portion of the property on the left hand side of the photograph, about mid-way from top to bottom, and what appears to be near a small island in the river; is that right? A. Yes.

Q. And that building is the same building shown here again about the left middle of Government's Exhibit 48; is that right? A. That is true.

Q. Now, you had seven or eight men in this little area. That is a kind of a cul-de-sac area, there is no way to go

back except the way you came in? A. Not in a vehicle.

Q. And you had your men in this area? A. That's right.

Q. Now, how many of them went to the door? A. Three, including myself.

Q. Isn't there a spillway some distance north of the building? A. Yes, sir.

Q. It is a hydroelectric spillway system? A. I don't know what it is.

Q. Water comes tumbling over it? A. Yes.

Q. It makes noise, doesn't it, as best you can recall? A. I can't give you an honest answer either way.

Q. Well, you have identified Government's Exhibit 47 as a fair and reasonable representation of the area in question? A. That's right.

Q. Now, doesn't that show water spilling over the spillway? A. It does.

Q. And from your experience that does create a considerable amount of noise, does it not, sir?

Mr. MARKLE. I object to that. He testified he doesn't really know either way, and I don't think he heard it.

[fol. 335] The COURT. That was the testimony of the witness, counsellor. He didn't know, one way or the other, whether it did create noise at that point or not.

Q. You don't know? A. I don't know.

Q. You don't recall whether or not you could hear it from where you were at the door? A. To be perfectly honest, I wasn't paying attention to it.

Q. But there was with you, am I correct, Investigator Shaw? A. That's right.

Q. And a member of the state police? A. Sergeant Joe Hart.

Q. He was the man who drove your car? A. That's right, sir.

Q. Were you armed? A. Yes.

Q. Did you have firearms drawn at this state? A. Yes, sir.

Q. All three of you? A. Yes, sir.

Q. Were there more than three standing around the door? A. No, sir.

Q. Just three? A. I would like to withdraw that. You say standing around the door?

Q. Yes. A. Well, I had men stationed on each side of the doorway.

Q. So that we will have some idea in size, would you come off the witness stand for just a moment, sir. Is it a fair statement to say that the big door that you testified to is approximately as wide as the bench? A. Easily.

Q. A little wider? A. Possibly.

Q. And would you give, for the record, your best estimate of the width of the door? A. The door had a circular top.

Q. Arch? A. Arch, rather, and it was not having any appreciable width at the top of the arch. But I would estimate that the door fully open on the bottom, was an excess of ten feet, possibly twelve, or even more.

Q. As much as twelve feet wide? A. I would say so.

Q. All right, sir, thank you. And was it a heavy door, sir, the big one? A. Yes, sir.

[fol. 336] Q. The best that you can recall, how thick was it? A. I didn't measure it.

Q. Well, was it more than an inch? A. I wouldn't even attempt to estimate, Mr. Flynn.

Q. It was thicker than what we would call a standard door; wasn't it? A. I made no comparison.

Q. You don't know? A. No.

Q. Did someone knock on that door, sir? A. Yes, sir.

Q. Who knocked? A. Investigator Shaw.

Q. And what did he do after he knocked? A. He announced himself as a federal officer with a search warrant and demanded admittance.

Q. Would you say that he shouted that? A. He did.

Q. At the top of his lungs? A. He did in a loud voice. I wouldn't say at the top of his lungs because I don't know how that would be.

Q. The top of his voice. He made a loud noise? A. In a loud manner.

Q. And he knocked on the door? A. Yes, sir.

Q. Would you demonstrate for me, please, how he knocked, the best that you can? Would you demonstrate, using the bench, say, as a door?

The WITNESS. Is it all right, your Honor?

A. (Demonstrating).

Q. Like that. Now, you are certain that he did that, Mr. Nadel, aren't you? A. Yes, sir.

Q. And you had to break in that door, didn't you? A. We did not break in the door.

Q. Wasn't there another little cut out door in that big door? Didn't you break it in? A. No, sir.

Q. You forced it? A. The latch that the key opened, one of the keys, rather, opened, didn't hold and we forced the door. We broke no portion of the door, as I recall.

[fol. 337] Q. Well, by that I mean you used force to gain entry into the building. A. We did, sir.

Q. And when you got into the building you had your firearms drawn; didn't you? A. That's right.

Q. And the two defendants that you found in the building, they knew you were there, they heard you coming in?

Mr. MARKLE. I object to that, if the Court please.

Mr. FLYNN. I will withdraw the question.

Q. Did they appear to be surprised? A. I couldn't answer that, Mr. Flynn.

Q. What did they appear to be doing as you got in the door? A. They were standing just inside the large doorway entering into the larger still room. They were standing over there.

Q. Wasn't there some coffee about? A. There was a container of coffee there somewhere. I don't exactly remember where.

Q. Mr. Nadel, isn't it true, sir, that you had on prior occasion seen these premises?

* * * *

[fols. 338-344] * * *

[fol. 345] Q. You indicated, Mr. Nadel, that this equipment was working when you got to the premises? A. The still was in operation, sir.

* * * *

[fols. 346-383] * * *

[fol. 384]

* * * *

Cross-examination By Mr. Calvocoressi:

* * * *

Q. You testified on direct examination, Mr. Nadel, that when you and your colleagues entered this still premises, shortly thereafter, you directed somebody there to shut off the still, or to show your agents how to shut off the still, and that was done. Am I correct in my recollection? A. I asked Frank Romano—

Mr. FLYNN. Objection, your Honor. That wasn't the question. That was no part of my cross, and the volunteering of names by this witness is improper.

The COURT. The objection is overruled. The witness may answer.

The WITNESS. When we entered the premises, I asked Frank Romano how to shut—not in the immediate sequence, because certain other things happened, and certainly other things were said—but I did ask Frank Romano how to shut the still off. And, he pointed to a switch on the wall, and he said, "You pull that."

I went over and pulled it, and I observed that the oil burner operating the steam boiler shut off.

By Mr. Calvocoressi:

Q. And did that effectively stop the operation of this still? A. Yes, sir.

Q. And thereafter, you testified that these various photographs of the still were taken? A. That's correct, sir.

[fols. 385-563] * * *

[fol. 564]

* * * *

Tuesday, May 15, 1962

* * * *

DAVID LERMAN, called as a witness, having been first duly sworn, testified as follows:

The CLERK. State your name.
The WITNESS. David Lerman.
The CLERK. Where are you from?
The WITNESS. New Haven.

Direct examination by Mr. Markle:

Q. Your address, sir? A. 261 Wolcott Street, New Haven.

Q. Are you employed? A. Yes, I am.

Q. As what, sir? A. I am president of the Keystone Bottle Company.

2 Q. And as such, what does Keystone Bottle Company handle? A. We handle glass bottles and jars.

Q. Is there any particular make or kind that you handle in particular? A. Our primary source is Knox glass. However, we handle Brockway Owens, also.

Q. Sir, directing your attention to October 4, 1960, at around 5:00 p.m., would you tell the Court and ladies and gentlemen of the jury, what, if anything, occurred at that time? A. Two men drove down to the warehouse, and asked to pick up a load of gallon jugs.

Q. Where is the warehouse? A. Wolcott Street, New Haven.

Q. All right. Do you see those men that were in that truck? A. Yes, I do.

[fol. 565] Q. Would you point them out, please? A. That one, there. (Indicating)

Mr. MARKLE. Mr. Romano, would you please stand up?

Q. Is that the man you indicate? A. Yes.

Mr. MARKLE. May the record show Frank Romano, if the Court pleases, stood.

By Mr. Markle:

Q. And do you see any other man? A. The other one, over there (indicating).

Q. That gentleman? A. Yes.

Mr. MARKLE. May the record indicate, if the Court please, that this man points out Edward Romano.

Q. And whether or not you had occasion to recognize the truck, or see the truck that they drove up in? A. Yes, because I helped them load the truck. It was 5:00 o'clock and all my men had left.

Q. Relate what happened at the time. A. They drove up at 5:00 o'clock that night and asked for a load of gallon jugs. I told them where to back the truck up, to our loading platform.

Q. Who was driving at the time, if you recall? A. The one over here. (Indicating) Is that Frank?

Q. (Indicating) This one here? A. Yes.

Q. Edward? A. Edward.

Q. Go on. A. He backed the truck up to our platform, and we proceeded to load the truck.

Q. When you say, "We," who loaded the truck, if you know? A. Well both of them, Frank and Edward, loaded it, and I brought the gallons down to them. We have a fork lift truck and all our gallons are on palattes. I would bring it down to the truck, and they unloaded it into the truck.

Q. Go on. What, if anything, happened at that time? A. Nothing unusual except that we finished loading the truck.

[fol. 566] Q. Did you have occasion to discuss the billing for the glass? A. Yes, I brought them into the office and invoiced them for the merchandise, at which time they paid me.

Q. Who paid you—Edward? A. Edward paid me.

Mr. MARKLE. May the Court record show that he is pointing to Edward.

Q. I ask you, sir, whether or not this is a copy of the delivery receipt, what purports to be a delivery receipt? A. Yes, this is our invoice to them.

Q. Was that prepared by you? A. Yes.

Q. What happened to the original, if you know? A. I gave them one copy and mailed another copy to the Oakdale Cider Mill in Milldale, Connecticut.

Q. Who had given you that name, if you recall? A. I don't remember which one.

Q. And you mailed it there, and what, if anything, happened as far as that is concerned? A. It came back, "unknown."

Q. What, if anything, did you do with it? A. Well, I filed that copy that Mr. Flynn has, and I threw the other one away.

Q. Is this the only copy in your possession, sir? A. Yes.

Q. Now, who drove the truck, sir, as it left the premises? A. Edward.

Q. Did you see who had driven the truck in? A. Edward.

Q. I show you a picture, Government's Exhibit 5, and ask you, sir, whether or not you can identify that. A. Yes, that is the truck.

Q. Is there some reason that you remember that? A. I remember it very well because I had bought a truck at the same time, same type of truck, and I was admiring their's.

I also remember it because it has wooden slats that they nailed down to the side to keep the canvas from blowing away.

Q. I would ask you, sir, whether or not you have ever seen either of these two gentlemen prior to that date? A. I don't think so.

[fol. 567] By the Court:

Q. What was your answer to that? A. I don't think so.

By Mr. Markle:

Q. Do you remember having occasion to do business with Russo Brothers Cider Mill from Johnson, Rhode Island? A. Yes. I have a feeling it was the same concern, but I can't be sure.

Q. Who do you think you did business with? A. I can't answer that; I don't remember.

Mr. FLYNN. Whoa, whoa.

Mr. MARKLE. All right, I will withdraw the question.

Q. Would you step down from the stand a moment. I show you what is Government's Exhibit 54, and I ask you to remove those bottles. A. (Examining)

Q. Did you examine that one? A. Yes.

Q. I also ask you to step down for a moment and look at this one. A. (Examining)

Q. Are those the same type of glasses carried by you, sir? A. Yes.

Q. And is there some distinctive way in which you can tell? A. The 52 on that case—

Mr. FLYNN. Objection, your Honor. Your Honor will recall that that was admitted for the contents and not for the container. I object to the reference to the container. The container is only there for the purpose of holding the contents.

Mr. MARKLE. I don't think I made that representation. But if necessary, I will establish the chain again on the box, and I ask that this be subject to connection, if the Court please. I don't believe that I was held to that.

The COURT. Well, we have the transcript, and we can examine the transcript as to whether the carton was included along with the glass jugs, to be absolutely correct about it.

[fol. 568] By Mr. Markle:

Q. Whether or not, sir, you recognize the carton? A. I recognize it.

Q. Is there some particular way in which you recognize the carton? A. Yes.

Q. And how is that, sir? A. The mold number 52 represents the mold number of Knox Glass, which is our primary source of supply. Those are Knox Glass jugs.

Q. Is it reasonable to say that these came from your premises?

Mr. FLYNN. Oh— is it reasonable?

The COURT. Sustained.

Q. Would you say that these came from your premises?

Mr. FLYNN. Objection.

Mr. MARKLE. Claim it.

The COURT. You may ask the witness whether or not he would be able to ascertain, from having examined it, whether he could identify whether that would be the same procured from his premises.

Q. Whether or not, having examined the box and the contents thereof, and more particularly the box, are you able to ascertain whether or not these came from your premises? A. Yes.

Mr. FLYNN. That is objected to. He is identifying the contents by means of a box.

Mr. MARKLE. I am saying more particularly the box.

Q. Limited to the box. Can you identify the box as coming from your premises? A. Yes.

Mr. MARKLE. I offer the box to this man, if there is such a limitation on it, if the Court please.

The COURT. It may be that the box and the containers are already in.

Mr. MARKLE. Yes, sir. I just want to clear the record.

[fol. 569] The COURT. You have the transcript there and you can go back to the time when they were offered as an exhibit, and that will clear the issue.

Counselor, you made an objection. Can you substantiate it by the record, and if so, where is the record?

Mr. FLYNN. I don't get a copy of the record each day. It is my recollection and I could be in error, it is my recollection that I asked whether the Government was claiming any of the containers, and the Government said they were not. I may be in error on this.

The COURT. Well, on page 469 of the transcript:

"Question: Mr. Nadel, I would ask you to identify the contents of two cardboard boxes?

"Answer: Yes, sir.

"Question: What are those?

"Answer: Those are two cardboard cartons containing four empty glass jugs in each of the cartons which were taken from Jewett City.

"The Court: They may be marked for identification only, as Government's Exhibit 54.

"Government's Exhibit for Identification 54: Two cartons containing four empty glass jugs in each of the cartons."

So, at that time, the Court admitted the exhibit, except those that were exempt, and they were identified by number and were admitted as full exhibits. Therefore, the cartons were included in the transcript and a part of the exhibit number 54. This is on page 470 of the transcript. If you would like to read that, you may.

Mr. FLYNN. If I may, sir, please.

(Pause.)

Maybe I am dealing in semantics, your Honor, but he was asked to identify the contents of two cardboard boxes. He was asked: "What are these?"

[fol. 570] The COURT. What did he say then?

Mr. FLYNN. He said, "I would ask you to identify what are those."

"They are two cardboard cartons containing four empty glass jugs in each of the cartons which were taken from Jewett City."

The COURT. How do you claim your client is prejudiced? They are the same carton, same bottles, that were taken from the premises in Jewett City by Inspector Nadel.

Mr. FLYNN. I have offered my objection, and your Honor has overruled it. I claim it is not properly qualified.

The COURT. The objection is overruled.

Mr. FLYNN. Thank you for the use of the copy.

By Mr. Markle:

Q. I would ask you, sir, whether or not there is some way that you can tell that these are from your premises? A. The mold numbers on the bottles signify that they are Knox Glass. I think we could go further. They have a date stamped in here.

Q. Would you examine it? A. However, I don't think I am qualified to read it.

Mr. FLYNN. Well, then, if he is not qualified, I object to him referring to it. A. (Examining) No, then I can't.

Q. There is a date stamped on it? A. I believe these numbers—

Mr. FLYNN. Object to it.

The COURT. The objection is sustained. He said he is not qualified.

Q. Now, I will ask you, Mr. Lerman, how you were paid for these glasses. You testified you were paid? A. Paid in cash.

Q. How? A. In cash.

Q. Which one paid you in cash, if you recall?

Mr. FLYNN. Repetitive, and objected to. It has already been in once.

[fol. 571] The COURT. He testified it was Edward.

Mr. MARKLE. I don't press it. I just don't recall the answer.

By Mr. Markle:

Q. Now, I would ask you, sir, which one of the two, if you know, if you recall, ordered these glasses, the glassware from you, sir? A. I think Edward did most of the talking.

Mr. MARKLE. I have no further questions, if the Court please, of this witness.

The COURT. You didn't offer the invoice, did you, Counsel?

Mr. MARKLE. I am sorry, I meant to. Do you have it, Mr. Flynn?

I would offer it, if the Court please.

The COURT. I knew you had shown it to counsel.

Mr. MARKEL. I had shown it to counsel, and I had forgotten he hadn't handed it back.

I will offer it, if the Court please.

The COURT. Any objection?

Mr. FLYNN. As being what?

Mr. MARKLE. As the bill of lading for the warehouse, the receipt he made out, and a copy to Mr. Romano.

Mr. FLYNN. I object to it on the grounds it is not the original of the invoice that was prepared. I don't know

whether or not the invoice, the original invoice prepared contains additional matter that would not appear on the duplicate.

Mr. MARKLE. Now, he has testified, if the Court please—

The COURT. Just a moment. Let him complete the objection.

Mr. FLYNN. And the foundation for the introduction of secondary evidence has not been properly laid.

Mr. MARKLE. The man testified, if the Court please, that the original was given to the Romanos; that the copy he mailed out came back, and he destroyed it. And, [fol. 572] this is the one, and the only one that he has in his possession.

I would claim it is permissible.

The COURT. Ask the witness how the copy was made.

By Mr. Markle:

Q. Mr. Lerman, how was this copy made?

Mr. FLYNN. If you know.

By Mr. Markle:

Q. If you know. A. What do you mean?

Q. What mechanical device was it made with? A. A typewriter.

Q. Where? A. In my office, by me.

Q. It was typed out by you? A. Yes, sir.

The COURT. What was used to make the copy?

The WITNESS. A carbon copy.

The COURT. Is that a duplicate original under carbon of the original that you prepared, or had prepared under your supervision?

The WITNESS. Yes, sir.

The COURT. Any objection, Counselor?

Mr. FLYNN. May I make a couple of inquiries?

By Mr. Flynn:

Q. Mr. Lerman, is it usual in your business to have the recipient sign for a receipt of goods? Is it usual, sir? A. It is usual, sir. It is not always done, however.

Q. But it is usual? A. Most of the time. When they pay cash, no. We don't deem it necessary when they pay cash, because it is over and done with at that point. However, a charge would be different.

[fol. 573] By Mr. Flynn:

Q. I'm sorry? A. A charge—if a person charged it, and wanted to be billed for it, we would require a signature showing that they picked the merchandise up.

Q. And this is a bill to the Oakdale Cider Mill? A. That's the name they gave me.

Q. Well, that is who the bill is to? A. Yes, it is.

Mr. FLYNN. Object.

The COURT. To whom did you tender this bill?

The WITNESS. To Edward Romano.

The COURT. Edward Romano?

The WITNESS. Yes.

The COURT. On this occasion?

The WITNESS. Yes.

The COURT. Objection overruled. Government's Exhibit No. 87.

Mr. CALVOCORESSI. If your Honor please, may it be noted for the record that we reserve the right to move to strike this exhibit, if it is not connected to Mr. Cohen, and the Griswold Corporation?

The COURT. That may be so noted.

(Government's Exhibit 87: Bill of lading of Keystone Bottle Corporation, dated October 4, 1960.)

Mr. MARKLE. I have no further questions at this time, Mr. Flynn.

Cross-examination by Mr. Flynn:

Q. Mr. Lerman, so there wouldn't be any question, Keystone Bottle Company— A. Yes, sir?

Q. My office represents that corporation? A. Yes, you do.

Q. But we have never discussed the fact that you were going to be here to testify?

[fol. 574] Mr. MARKLE. I wouldn't even claim it, and I wouldn't—

Mr. FLYNN. I want the record to be clear.

Mr. MARKLE. You have no problem with me. I will tell you that.

By Mr. Flynn:

Q. Now, Mr. Lerman, you folks distribute glass here in Connecticut, don't you? A. Yes, sir.

Q. And that is a national company? A. That's right.

Q. They have other distributors, don't they? A. Yes.

Q. They have them in Boston? A. They do.

Q. And New York? A. That's right.

Q. Your company does sell some glass in the Worcester area? A. Yes, we do.

Q. Is there a Massachusetts distributor, also? A. Right.

Q. And when you say that these are the cartons that you sold, your means of identifying these cartons are merely that they are Knox bottles? A. Right.

Q. There is nothing, however, about this jug which would identify it as a Keystone Knox jug? A. You are absolutely right.

Q. In other words, you infer that this jug, or one, anyone like it is the same jug that you may have sold on another occasion; is that right? A. That's right.

Q. And the same is true of all these jugs; there is, in fact, no way that you can tell whether or not these jugs are the same jugs? A. You are right.

Q. Now, there has been a question put to you, sir, and I think it is kind of a unique question. You were asked to look at Government's Exhibit 5, to identify a truck. And you looked at that exhibit, and you said that you had purchased, on behalf of the Keystone Bottling Company, a truck of similar type and make? A. Right.

Q. And there are, frankly sir, a number of Ford trucks of that type on the road, are there not? A. Yes.

[fol. 575] Q. But, am I correct, sir, that you made no memoranda or notation of the marker plate on that particular truck? A. That's right.

Q. You did not? A. I did not.

Q. So that you wouldn't wish to convey the impression that you absolutely remembered this truck. It was just a truck of a similar model and make? A. No, you are wrong.

Q. Well, is there something that is specifically, that distinguishes this truck other than the marker plate? A. That's right.

Q. What was that? A. The canvas; the way the canvas was put on, and these wooden slats here were nailed down to the canvas.

The COURT. For the record, would you identify what those slats are, counselor?

Mr. FLYNN. They appear to be light areas in back of the side rear-view mirror, as appears on the left side of the truck, as you look at the photograph in Government's Exhibit 5.

By Mr. Flynn:

Q. Is that correct, Mr. Lerman? A. Yes.

Q. In other words, your means of identifying the truck that you saw in this picture with the one that was at your place of business was the fact that the canvas was nailed down; is that right? A. Right.

Q. But the question is whether or not there could be—isn't it possible, Mr. Lerman, there could be another truck with the canvas that would be nailed down? Isn't it possible? A. Yes.

Mr. FLYNN. I failed to ask this, but I'd like to see Mr. Lerman's statement.

The COURT. The Government will turn over the entire statement of the witness.

(Pause.)

[fol. 576] By Mr. Flynn:

Q. Now, Mr. Lerman, you did give a statement, did you not? A. Yes.

Q. To a man by the name of Crowley, and you gave that statement in December of 1960; is that right? A. Yes, sir.

Q. By the way, sir, do you people sell glass jugs to any registered distilleries? A. There are very few distilleries in Connecticut.

Q. How about wineries? A. Yes.

Q. Bon Core Wine? A. That's right.

Q. You do make sales to Bon Core Wine? A. Yes.

Q. And there is a subsidiary of Bon Core Wine, is there not? In the New Haven area? A. Yes.

Q. And you sell to them? A. We do.

Q. Do you sell to the cider producers in Wallingford, Connecticut? A. Yes.

Q. Do you sell—as a matter of fact, gallon jugs to a number of outlets? A. We do.

Q. As a matter of fact, Keystone is a subsidiary of another company, is it not? A. That's right.

Q. What is the name of the other company? A. Feldman Glass Company.

Q. And between the Keystone and Feldman Glass, you people manage to sell a very large number of gallon jugs? A. Thank you.

Q. Isn't that true? A. Yes, we do.

Q. I am glad, too. And, it would be impossible, would it not, Mr. Lerman, for you to distinguish from what source any of those glass jugs came? A. That's right.

Q. Right? A. Yes.

Q. Now, when you identified the men who were at your place of business on the 4th of October, were you shown any photographs? A. Yes.

Q. How many times were you shown a photograph? A. Once.

[fol. 577] Q. How many photographs were you shown? A. I don't remember.

Q. A number? A. A few.

Q. Three? A. Possibly.

Q. And you were told who the persons depicted in those photographs were? A. I was.

Q. Is that right? A. I was.

Q. Where were these photographs shown to you, if you recall, Mr. Lerman? Was it down on Wolcott Street? A. I believe at the Post Office in New Haven.

Q. In the Post Office Building in New Haven? A. Yes.

Q. In the United States Attorney's Office? A. I don't remember whose office it was at.

Q. And they were shown to you by a Mr. Crowley? A. Mr. Crowley.

Q. Since that time, have you been shown those photographs? A. No.

Q. You have never seen a photograph of either of the men that you pointed out since that time; is that right? A. No.

Q. And you were told, for example, that one of the people in one of the photographs was Edward Romano, were you not? A. Yes.

Q. And when you pointed out Edward Romano as the person who came, and named him, that was because you were told that's who he was? A. Mr. Flynn, I could even tell you the clothes that Edward Romano was wearing.

Q. I don't question that at all. All I want to know is whether or not you were told that's who he was? A. Yes, sir.

Q. And about these cartons, sir, there is nothing about these cartons that is distinguishing, except the fact that it carries a trademarking, indicating that it is a Knox carton? A. That's right.

Q. So it is just as reasonable to infer, is it not, sir, that these cartons could have come from the Boston distributor, or the New York distributor? A. Very true.

[fol. 578] Q. Or the Albany distributor? A. Very true.

Q. Is there a distributor in western Massachusetts, in Springfield? A. No.

Q. In New Hampshire, Maine, Vermont area? A. No.

Q. Is there one in Rhode Island? A. No, sir.

Q. But there is one in Boston; there is one in New York City, or maybe more than one? A. That's right.

Q. And there is one in upstate New York? A. No.

Q. There isn't? A. No.

Q. So, for all you know, these cartons—all you can say about them is that they are Knox Glass, and that you sell Knox Glass? A. That's right.

Q. You cannot say, am I correct, that these are the jugs that you sold on the 4th of October? A. You are right.

Q. Quite right? A. Right.

Mr. FLYNN. That's all.

* * * *

[fols. 579-659] * * *

[fol. 660] RAYMOND V. LAPORTE, called as a witness, being first duly sworn, was examined, and testified as follows:

The CLERK. What is your name?

The WITNESS. Raymond V. LaPorte.

Direct examination by Mr. Markle:

Q. Where are you from? A. Providence, Rhode Island.

Q. Mr. LaPorte, what is your occupation, sir? A. I am an investigator with the United States Treasury Department, Alcohol and Tobacco Tax Division.

Q. For how long have you been so employed? A. Six years.

Q. And what was your position in October, 1960? A. Same position, investigator with the Alcohol and Tobacco Tax Division.

Q. Now, sir, directing your attention to October 12, 1960, at approximately 7:05 a.m.; where were you, sir? A. I was at an observation post across from the Aspinook Mills, Jewett City, Connecticut.

Q. And what, if anything were you doing there? A. I was observing the suspected still premises across the river.

Q. And what, if anything, was observed by you at that time? A. Well, at approximately 7:05 a.m., I observed

a dark colored Buick automobile proceed to that still building. And, with the use of binoculars, I could tell—I saw the number plates on that vehicle were NO370. They were white letters on a dark background.

Q. What, if anything, happened then? A. I saw a man about thirty-five years of age, black hair, come out of that car, and go into the suspected building. The man appeared to be carrying a brown paper bag, and another item of what appeared to be clothing.

[fol. 661] Q. And what, if anything, further did you observe? A. Approximately 7:15 a.m., another male came out of the building wearing a bright red jacket, but I couldn't tell whether it was the same individual that had gone in.

Q. What, if anything, happened then? A. He got into that car, and proceeded away from my view.

* * * *

[fols. 662-828] * * *

[fol. 829]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 10,284

UNITED STATES OF AMERICA

vs.

FRANK ROMANO

JUDGMENT AND COMMITMENT—Filed June 29, 1962.

On this 29th day of June, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his pleas of not guilty, and a finding of guilty by the jury of the offenses of violation of Title 26, Sections 5601 (a) (1) [possession of a distilling apparatus not registered as required by 26 USC, 5179(a)] and 5601(a) (8) [producing distilled spirits, not being authorized by law to do so] and of Title 18, Sec. 371 of the U.S. Code (conspire to violate the laws of the United States) as charged in three (3) counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and is hereby fined ten thousand dollars

($10,000.) on the first count, and three (3) years imprisonment on counts two (2) and three (3), concurrent with each other and with the term of imprisonment im-
[fol. 830] posed in count one (1). The defendant shall stand committed until payment of the fine imposed in the first count is paid, or, until otherwise discharged as provided by law.

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ T. EMMET CLARIE
United States District Judge.

The Court recommends commitment to:

Clerk.

A True Copy. Certified this 29th day of June, 1962

(Signed) GILBERT C. EARL
Clerk

(By) SYLVESTER A. MARKOWSKI,
Deputy Clerk

[fol. 831]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 10,284

UNITED STATES OF AMERICA

vs.

JOHN OTTIANO

JUDGMENT AND COMMITMENT—Filed June 29, 1962.

On this 29th day of June, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a finding of guilty by the jury of the offenses of Title 26, Sec. 5601(a)(1) of the U.S. Code, (possession of a distilling apparatus not registered as required by 26 USC 5179(a)) and 5601(a)(8) [producing distilled spirits, not being authorized by law to do so] and of Title 18, Sec. 371 of the U.S. Code (conspire to violate the laws of the United States) as charged in three (3) counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years and is hereby fined five thousand dollars ($5,000.) on the first count, and two (2) years imprisonment on counts two (2) and three (3), concurrent with each

other and with the term of imprisonment imposed in count one (1). The defendant shall stand committed until pay-
[fol. 832] ment of the fine imposed in count one is paid, or, until otherwise discharged as provided by law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ T. EMMET CLARIE
United States District Judge

The Court recommends commitment to:

Clerk.

A True Copy. Certified this 29th day of June, 1962

(Signed) GILBERT C. EARL
Clerk

(By) SYLVESTER A. MARKOWSKI,
Deputy Clerk.

[fol. 833]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 10,284

UNITED STATES OF AMERICA

vs.

EDWARD ROMANO

JUDGMENT AND COMMITMENT—Filed June 29, 1962.

On this 29th day of June, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a finding of guilty by the jury of the offenses of violation of Title 26, Sec. 5601(a)(8) of the U.S. Code (producing distilled spirits, not being authorized by law to do so) and of Title 18, Sec. 371 of the U.S. Code (conspire to violate the laws of the United States) as charged in counts 2 and 3, the defendant was not charged in count 1 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and fined ten thousand dollars ($10,000.) on the second count, and three (3) years imprisonment on the third count, concurrent with count two (2). The de-

fendant is to stand committed until payment of the fine imposed on count two (2) is made, or until otherwise discharged as provided by law.

[fol. 834] IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ T. EMMET CLARIE
United States District Judge

The Court recommends commitment to:

Clerk.

A True Copy. Certified this 29th day of June, 1962

(Signed) GILBERT C. EARL
Clerk

(By) SYLVESTER A. MARKOWSKI,
Deputy Clerk.

[fol. 835]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 10,284

UNITED STATES OF AMERICA

vs.

ANTONIO VELLUCCI

JUDGMENT AND COMMITMENT—Filed June 29, 1962.

On this 29th day of June, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a finding of guilty by the jury of the offenses of violation of Title 26, Sec. 5601(a)(8) of the U.S. Code (producing distilled spirits, not being authorized by law to do so) and of Title 18, Sec. 371 of the U.S. Code (conspire to violate the laws of the United States) as charged in counts 2 and 3, the defendant was not charged in count 1 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and is hereby fined one thousand dollars ($1,000.) on the second count, and one (1) year imprisonment on the third count, concurrent with count two (2).

The defendant is to stand committed until the payment of the fine imposed on count two (2) is paid, or, until otherwise discharged as provided by law.

[fol. 836] It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ T. Emmet Clarie
United States District Judge

The Court recommends commitment to:

Clerk.

A True Copy. Certified this 29th day of June, 1962

(Signed) Gilbert C. Earl
Clerk

(By) Sylvester A. Markowski,
Deputy Clerk.

[fols. 837-844] * * *

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 28227

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO, ANTONIO VELLUCCI, DEFENDANTS-APPELLANTS

On Appeal From The United States District Court For The District of Connecticut

SUPPLEMENTAL APPENDIX—filed January 4, 1964

* * * *

[File Endorsement Omitted]

[fol. 845]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 10,284

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* * * *

CHARGE OF THE COURT:

The COURT. Good morning, ladies and gentlemen.

Ladies and gentlemen of the Jury, it is now time for the Court to instruct you concerning the law in this particular case. The Court has not timed itself as to how long it is going to take in the instructions, but, being ever conscious of the human qualities of every human being, and being able to listen and sit in one position for any length of time, in the event that the Court has not completed the charge 'long toward 11:30, a quarter of 12:00, we will take a short recess.

I hope it will not be too long; I trust it will not be, yet will be sufficient to cover all of the elements that have been considered here.

Now that you have heard the evidence and the arguments, the time has come to instruct you as to the law governing the case. Although you, as Jurors, are the sole judges of the facts, you are duty-bound to follow the law as stated in the instructions of the Court, and to apply the law so given to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

[fol. 846] Neither are you to be concerned with the wisdom of any rule of law, because if the Court instructs

you wrong, then in the record there is always an appeal from the wrong instruction. But, the facts as you find them in the Jury Room, there is little opportunity to correct that on the record, because your deliberations are private, and are between yourselves during the course of deliberations in the Jury Room.

So, it is important that you should follow the instructions of the Court with respect to the law.

As I said, if the Judge is wrong in instructing you on the law, counsel have the opportunity always to appeal to the Circuit Court of Appeals. So, regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

Unless otherwise indicated, each instruction should be considered by you as referring separately and individually to each defendant on trial.

You have been chosen as Jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "not guilty" plea of each of the accused. You are to perform this duty without bias or prejudice as to any party.

The law does not permit Jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the [fol. 847] law permits nothing but legal evidence presented before the Jury to be considered in support of any charge against the accused. So, the presumption of innocence alone is sufficient to acquit a defendant, unless the Jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt based upon reason and common sense, and arising from the state of the evidence. It is rarely possible to prove anything to an

absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

A defendant may also rely upon evidence brought out on the cross-examination of witnesses for the prosecution.

The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when after careful and impartial consideration of all the evidence, the Jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

An indictment is the formal complaint that you will have in your Jury Room with you. I have a copy of it here. The Clerk has the original in his possession, but the original is a document similar to this in form.

[fol. 848] The indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

There are two types of evidence in which a Jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye-witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation

of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the Jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The Court may take judicial notice of facts or events which are matters of common knowledge. When the Court declares it will take judicial notice of some fact or event, the Jury must accept the Court's declaration as evidence, and regard as conclusively proved the fact or event which the Court has judicially noticed.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence as full exhibits, except that exhibits received against a particular defendant only may be considered only as evidence in respect to that individual, and none of the others.

[fol. 849] Evidence shall include all facts which have been admitted or stipulated, all facts and events which have been judicially noticed, and all applicable presumptions stated in these instructions.

I think I should add, too, as I stated before, all of the evidence adduced by cross-examination as well as direct examination and redirect examination. All of the testimony adduced by witnesses.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded, and in this regard, you will remember there were certain instances that came up in particular, where there was objection, and the answer was ordered stricken. At that time, the Court instructed the Jury to disregard the answer, the particular answer.

I think it is pertinent to mention at this time, too, that you will recall at the early part of this case—it wasn't too early—very recently, last week, certain defendants were dropped as parties defendant, and motions were made subsequently, and the Jury instructed to disregard and to mit, to obliterate from your minds, as you can, as intelligent, reasonable beings, obliterate from your minds the testimony that involved the defendants, Gris-

wold Corporation and Samuel Cohen, and eliminate that evidence from your considerations completely.

The only evidence you should consider will be the evidence against the four defendants, which was admitted as to those four defendants before you here in Court.

You are to consider only the evidence in the case, and in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from facts which you find have [fol. 850] been proved, such reasonable inferences as seem justified in the light of your own experience.

An inference is a deduction or conclusion which reason and common sense lead the Jury to draw from facts which have been proved.

Now, a presumption, on the other hand, is a conclusion which the law requires the Jury to make, or permits them to make, from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but, unless so outweighed, the Jury are bound to find in accordance with the presumption.

However, in any presumption that is referred to in the Court's charge, you will consider that presumption in the light of all of the evidence which has been offered in arriving at a conclusion, keeping always in mind that it is the burden of the Government to prove beyond a reasonable doubt the guilt of each accused.

Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that a witness speaks the truth; that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed. Those are ordinary presumptions.

Now, actually you have been trying two separate cases on the first count of the indictment, and four separate cases on the second and third counts of this indictment.

The first case is the *United States* vs. *Frank Romano* on all three counts; the second case is the *United States*

[fol. 851] vs. *John Ottiano*, also on all three counts. The third case is the *United States* vs. *Edward Romano* on the second and third counts; and the fourth case is the *United States* vs. *Antonio Vellucci*, also on the second and third counts.

In the interest of time and economy, these cases have been tried together. This is due to the fact that the offer of evidence by the Government in many respects overlaps in all four cases.

You are instructed that your findings in one case do not in themselves establish a basis of similar findings in each of the other cases. For all practical purposes, the defendants are to be considered as on trial separately. That is, the guilt or innocence of one will not affect the guilt or innocence of any other. Such will depend upon your findings, upon the evidence, and the law as stated by the Court.

The guilt or innocence of each defendant is to be considered as if he were on trial alone for the offense or offenses for which he stands charged. You will be required, therefore, to render a verdict on each defendant separately.

You will recall that during the trial, certain objections were made to some of the evidence offered by the Government, and the Court admitted it against one of the accused, but not against the others.

That situation imposes upon you a duty which you may find difficult, but clear. Where evidence was admitted against one of the accused and not the others, it is necessary that you consider it only in arriving at your conclusion of the innocence or guilt of the one against whom it was admitted and entirely disregard it in deciding upon the innocence or guilt of the others.

[fol. 852] I want particularly to emphasize the fact with reference to the following:

In respect to Vellucci, the hospital records of Vellucci were offered as to him alone.

Second, the tax receipt on the truck was offered as to Vellucci alone.

The statement to the investigator, Lanigan, by Vellucci, was offered as to him alone, and against him alone.

In respect to Ottiano, the registration of the 1950 Buick was offered as to Ottiano alone, as was the bill of sale from Brocolli to Ottiano. That was offered against Ottiano alone.

The statement of Ottiano to Investigator LaPorte at the Danielson State Police Barracks was offered against Ottiano alone.

The statement made by Ottiano at the time of the raid, wherein he is alleged to have said that something to the effect that he only drove the stuff down here, or up here —that was offered only as to him, as to him alone.

As to Frank Romano, the statement of Frank Romano at the time of the raid, to the effect that he had only been there three days, his alleged or claimed statement to that effect, that was offered as to him alone.

The Court's position is that the conspiracy ceased when the Government was admitted under a search warrant, and any statement made thereafter would not be admitted against the alleged conspiracy but against the defendant who made that statement, as to him alone. Briefly, any statements made by any one of the defendants after October 13, 1960, may be considered by you as evidencing innocence or guilt only as to the person who gave such statements.

[fol. 853] It is to be noted also that evidence was introduced to show that the accused, Edward Romano, was convicted of the crime of breaking and entering with the intent to commit larceny in the year 1945 in the State of Massachusetts. Evidence of the commission of another crime other than the one charged is not admissible to prove the guilt of the accused, Edward Romano, in this particular case presently before the Court. The commission of other crimes by the accused, or other crime by this accused, has been allowed in evidence for the sole purpose of affecting his credibility, truthfulness. Such evidence does not permit the inference that the accused, Edward Romano, committed the crime or crimes with which he is charged in the indictment, and you are not to disregard the evidence of the accused merely because he was convicted of another crime. You must weigh the

testimony, consider it along with all of the other evidence in the case.

You may take into consideration the conviction of Edward Romano as bearing upon his credibility but you should determine that credibility upon the same considerations as those given to any other witness.

With respect to Count One, Count One of the indictment charges that, "On divers dates between September 1, 1960, to and including October 13, 1960, at Jewett City, Connecticut, within the jurisdiction of this Court, Frank Romano, John Ottiano, the defendants herein, did, in violation of Title 26, United States Code, Section 5601(a)(1), have in their possession, custody, and under their control, a still and distilling apparatus set up which was then and there not registered as required by Title 26, United States Code, Section 5179(a)."

That is in the first count only as against Frank Romano and John Ottiano.

[fol. 854] Now, Section 5601(a)(1) of the Federal Statutes reads as follows:

"Any person who has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by Section 5179(a), shall be in violation of the laws of the United States.

Section 5179(a) which pertains to the registration of stills reads:

"Every person having in his possession or custody or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary of the Treasury or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its capacity, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used (except that stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section)."

You will note that this law applies to any person who has such an unregistered still in his possession or under his control. You will note that it does not require proof of ownership to prove possession. The law recognizes two kinds of possessions: Actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has [fol. 855] actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint.

If you find from the evidence, beyond a reasonable doubt, that only one of the two accused, Frank Romano or John Ottiano, individually and alone had active or constructive possession of the still and distilling apparatus described in the indictment, then you may find that such individual accused was in possession of the said personal properly within the meaning of the word, "Possession," as used in these instructions.

However, should you find beyond a reasonable doubt that possession was had jointly by both accused, Frank Romano and John Ottiano, then you may find that such still and distilling apparatus was in the joint possession of both accused within the meaning of the word, "Possession," as used herein.

Should you find beyond a reasonable doubt that said still or distilling apparatus was in the possession or custody, or under the control, of Frank Romano and John Ottiano, or either one of them, and the same had not been registered with the Secretary of the Treasury of the United States, or his delegate, at the time of the raid on October 13, 1960; and you find further that on said date at said time, the still and distilling apparatus had been assembled and set up, then, you may find as a fact that

said still or distilling apparatus had or had not been registered as required by Title 26, Section 5179(a).

And you heard the testimony of the agent from Boston as to the names under which he examined the registry and what his testimony was, and it is for you to determine whether or not the Government proved beyond a reasonable doubt as to the registration of this particular still or distilling apparatus.

[fol. 856] There is one further provision of law which you may considered in considering the first count of the indictment. Title 26, Section 5601(b)(1) reads as follows:

"Presumptions—Unregistered Stills:

"Whenever on trial for violation of Sub-section (a)(1)"—that concerns possessions of an unregistered still—"the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury."

Therefore, the elements of the crime for you to consider under the first count are:

(1) Did either of the defendants, Frank Romano or John Ottiano, have in their possession, custody or under their control on October 13, 1960, a still or distilling apparatus set up; was possession in one or both;

(2) Was it registered with the Secretary of the Treasury of the United States or his delegate (agent) on said date.

It is for you, the Jury, to determine whether the aforesaid elements of the crime charged have been proven by the Government beyond a reasonable doubt as to both defendants or either one of them.

On your findings shall be determined the guilt or innocence of said defendants on the first count.

Count Two of the indictment charges that:

"On divers dates between September 1, 1960, to and including October 13, 1960, at Jewett City, Connecticut,

within the jurisdiction of this Court, Frank Romano, [fol. 857] John Ottiano, Edward Romano, Antonio Vellucci (together with other named persons concerning whom you now need have no further concern because their case as defendants is not before you at this time) did in violation of Title 26, United States Code, Section 5601 (a) (8), then and there not being distillers authorized by law to produce distilled spirits, produced distilled spirits by distillation and other process from mash, wort, wash, and other materials."

This section of the law, 5601(a) (8) reads as follows:

"Any person who, not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash or other material, shall be in violation of the laws of the United States."

What is distilled spirits? Title 26, Section 5002(a) (6) defines distilled spirits as follows:

"The term 'distilled spirits,' 'alcoholic spirits' and 'spirits' mean that substance known as ethyl alcohol, ethanol, or spirits of wine, including all dilutions and mixtures thereof, from whatever source or by whatever process produced, and shall include whiskey, brandy, rum, gin, and vodka."

That is the statutory definition of distilled spirits.

The law under which the allegation of the crime arises uses the terminology, "Any person not being a distiller authorized by law." This raises the question, "Who is a distiller?"

Title 26, Section 5002(a) (5) says the term, "Distiller," shall include every person, (a) who produces distilled spirits from any source or substance;

(b) who produces or makes mash, wort, or wash fit for distillation or for production of distilled spirits with certain authorized exceptions as to wine, beer, and vinegar;

[fol. 858] (c) who by any process separates alcoholic spirits from fermented substances or;

(d) who is making or keeping mash, wort, or wash has also in his possession or use a still.

The next question, in substance, is identical with that to which I have made reference in the first count, namely, was the premise building, 9A, ever legally registered with the Secretary of the Treasury or his delegate, agent, as a still or distillation apparatus set up on October 13, 1960. And that is for you to determine in accordance with all of the evidence and keeping in mind always that the proof must be beyond a reasonable doubt.

Finally, did any of the defendants, not being properly registered as distillers, and thereby authorized by law, produce distilled spirits by distillation or other process from mash, wort, wash and other materials between September 1, 1960, and October 13, 1960? A statutory presumption similar to that referred to by the Court under the first count is applicable to the second count.

Section 5601(b)(4) provides:

"Whenever on trial for violation of Sub-section (a)(8), that is, producing distilled spirits, the defendant is shown to have been at the site or place and at the time when such distilled spirits were produced by distillation or any other process from mash, wort, wash or other materials, such presence of the defendant shall be deemed sufficient evidence to authorize conviction unless the defendant explains such presence to the satisfaction of the jury."

You will note for the presumption to become operative a defendant to which it might apply must be shown to have been at the site when the spirits were actually being [fol. 859] produced. Unless you are satisfied that any specific defendant was actually on the premises when such spirits were being produced, this presumption against him shall not apply.

On the second count, there are four named defendants charged as having committed a crime, carrying out a common act under the second count. In any such case where two or more persons are charged with the commission of a crime, the guilt of the accused must be established or may be established without proof that all the defendants did every act constituting the offense.

"Whoever commits an offense against the United States, or (wilfully) aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

Every person who thus wilfully participates in the commission of a crime may be found to be guilty of that offense. Participation is wilful if done voluntarily and purposefully and with specific intent to do some act the law forbids, or with the specific intent to fail to do something which the law requires to be done, that is to say, with bad purpose either to disobey or disregard the law.

In order to aid and abet another to commit a crime, it is necessary that a defendant wilfully associate himself in some way with the criminal venture; and that he wilfully participate in it as in something he wishes to bring about; and that he wilfully seeks by some action of his to make it succeed.

When two or more persons associate themselves together in carrying out a common plan, lawful or unlawful, there arises from the very act of associating themselves together for such a purpose a kind of a partnership in which each member becomes the agent of every other member.

[fol. 860] So in a case where the evidence shows a common plan or arrangement between two or more persons, evidence as to an act done or statement made by one is admissible against all, provided the act be knowingly done and the statement be knowingly made during the continuance of the arrangement between them, and in furtherance of an object or purpose of the common plan.

In order to establish proof that a common plan or arangement existed, the evidence must show that the parties to the plan in some way or manner, or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish some common object or purpose. In this instance, such purpose would obviously be the production of distilled spirits by distillation or other process of mash at Aspinook Mill site in Jewett City. In other words, that would be the question as to proof, whether or not these four persons knowing that a still existed there, committed certain acts to further the purpose of distilling illegal alcoholic beverages at the Aspinook Mill premises.

In order to establish proof that a defendant, or any other person, was a party to, or member of some common

plan or arrangement, the evidence must show that the plan was formed, and that the defendant, or other person who is claimed to have been a member, knowingly participated in the plan with the intent to advance or further some object or purpose of the plan.

In other words, by way of illustration, there was some evidence you heard about the delivery of some sugar down in Providence to one of the defendants, allegedly. For that defendant to be involved on that particular act, that is, the delivery of sugar, is a common thing in and of itself, it is a legal thing in and of itself, but for you to connect up that defendant into this particular alleged [fol. 861] crime, it must be shown to your satisfaction and beyond a reasonable doubt from all of the evidence that that particular defendant knew of the existence of this illegal operation at the Aspinook premises, and that his act at that time was in furtherance of accomplishing the ultimate goal of the distillation and production of distilled spirits at Jewett City.

As to the allegation about the bottles, there is no harm in a person going out and getting some bottles. You can make vinegar or root beer, or a hundred and one things, but the question is, did the procurement of the particular product, the bottle in a similar instance, was it done by any of the Defendants, knowing that it was for the purpose of furthering an illegal production of distilled spirits at Jewett City. If it was done, whether it was in New Haven or Providence, or elsewhere, to further a purpose of the criminal act at Jewett City, that would be in the category of aiding and abetting. That is the point I want to try to explain to you by illustration, nothing further.

And because I comment on it, I am not intending to pick up any particular thread of the evidence to accent it in your mind or emphasize it. I just mention it in passing by way of illustration.

In determining whether or not a defendant, or any other person, was a party to or member of a common plan, the Jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a common plan must be

established by evidence as to his own conduct, what he himself said or did.

If and when it appears from the evidence that a common plan did exist, and that a defendant was one of the members, then the act thereafter knowingly done, and [fol. 862] the statements thereafter knowingly made by a person likewise found to be a member, may be considered by the Jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such common plan and in furtherance of an object or purpose of the plan.

Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement made.

Now, with respect to the third count, the third count of the indictment charges that:

"On divers dates between August 1, 1960, to and including October 13, 1960, at Providence, Rhode Island, in the District of Rhode Island, at New Bedford, Massachusetts, in the District of Massachusetts, at Jewett City, Connecticut, within the jurisdiction of this Court, Frank Romano, John Ottiano, Edward Romano, and Antonio Vellucci, the defendants herein, did, unlawfully conspire, agree, and confederate together, with one another and with each other in violation of Title 18, United States Code, Section 371, to commit an offense against the laws of the United States to wit:

"A violation of Title 26, United States Code, Section 5601 (a) (8), producing distilled spirits by distillation and other processes from mash, wort, wash and other materials, then and there not being distillers authorized by law to produce distilled spirits, and did commit, among others, the following overt acts in furtherance of and to effect the object of the conspiracy:

[fol. 863] "1. On divers dates between September 1, 1960, and including October 13, 1960, the co-conspirators

and defendants herein, Edward Romano, Frank Romano, John Ottiano, did visit the premises at the Aspinook Mill, Jewett City, Connecticut, within the jurisdiction of this Court wherein an illegal distillery was in operation producing distilled spirits."

The second overt act applies to two persons who are no longer defendants and with whom you need not be concerned.

The third overt act alleges, "On divers dates between September 1, 1960, and including October 13, 1960, the said defendant and co-conspirator, Antonio Vellucci, did aid in the transportation of raw materials used in distillation of distilled spirits to the aforesaid premises from Providence, Rhode Island."

The fourth overt act applies to a person who is no longer a defendant and with whom you need not be concerned. With respect to that, that would pertain to Zarkin who was from New Bedford, and in passing I might mention that that part of the indictment that refers to any incident occurring or transpiring in New Bedford, Massachusetts, may also be excluded from your minds because that referred to Zarkin, who is no longer a defendant in the action.

Section 371 of Title 18 of the United States Code provides in part that:

"If two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished as the law provides."

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purposes, or to accomplish a lawful purpose by unlawful means. Thus, a conspiracy is a kind of partnership in criminal [fol. 864] purposes in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact they may have associated with each other, and may have assembled together and discussed common aims

and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be achieved. What the evidence must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

It is not necessary for the prosecution to prove that all the means or methods set forth in the indictment were agreed upon to carry out the conspiracy, or that all such means or methods were actually used or put into operation. But it is necessary that the evidence establish to the satisfaction of the Jury that one or more of the means or methods described in the indictment was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator.

[fol. 865] Before a Jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and wilfully means to participate voluntarily and understandingly and with specific intent to do some act the law forbids, or with specific intent to fail to do some act the law requires to be done; that is to say, to participate with bad purpose, either to disobey or to disregard the law. So if a defendant, or any

other person, with understanding of the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and wilful participant—a conspirator.

One who knowingly and wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of the conspiracy.

In determining whether or not a defendant, or any other person, was a member of a conspiracy, the Jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the act thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the Jury as evidence in the case as to the defendant found [fol. 866] to be a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy. Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who is not present and heard the statements made.

That is the reason for the Court's charge. You will recall that after October 13th when the search warrant was served, any statement made after that by any individual, that statement applies to him alone and not to the others because the alleged conspiracy at that time terminated at the time of the arrest.

In your consideration of the evidence as to the offense in the conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that such conspiracy did exist, you should next determine as to each of the ac-

cused whether or not each accused knowingly and wilfully became a member of the conspiracy.

If it appears from the evidence beyond a reasonable doubt that the conspiracy was knowingly and wilfully formed, as alleged in the indictment, and that each of the accused knowingly and wilfully became a member of the conspiracy at the inception of the plan or scheme or afterwards, and that thereafter one or more of the conspirators knowingly committed in furtherance of an object or purpose of the conspiracy, the overt act charged, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

By the term, "Overt act," is meant any act committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered [fol. 867] separately and apart from the conspiracy. The illustration that I gave, if one of you delivered some sugar bags to someone else, that in itself is a legal act, and in and of itself. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It must, however, be an act which follows and tends towards accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

In order to establish the offense of conspiracy charged in the indictment, the evidence must show beyond a reasonable doubt, first that the conspiracy described was formed and existing at or about the time alleged.

Secondly, that the accused knowingly and wilfully became a member of the conspiracy; and third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; and fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

If you find from the evidence beyond a reasonable doubt that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some

object or purpose of the conspiracy as charged, proof of the conspiracy or offense charged is complete, and it is complete as to every person found by you to have been knowingly and wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

I think probably this might be a good time to take a five-minute recess, ladies and gentlemen.

[fol. 868] I have probably about ten more pages, and I should not trespass upon your patience, even though it may be a little early, but, we will take a five-minute recess.

(At this point, there was a short recess.)

* * * *

The COURT. All evidence relating to any oral admission or oral confession or other incriminating statement claimed to have been made by a defendant outside of Court should be considered with caution, and weighed with great care.

Thus, you may consider all of the evidence brought out by the Government witnesses on direct examination and by defense counsel on their cross-examination, together with such further evidence as the defense offered in arriving at a conclusion as to the facts here in issue.

Conduct of a defendant, including statements made and acts done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the Jury in the light of other evidence in the case in determining the guilt or innocence of the accused.

When a defendant voluntarily offers an explanation, or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, the Jury may consider whether this circumstantial evidence permits or points to a consciousness of guilt.

It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the Jury.

[fol. 869] A confession is an admission by a defendant of all the facts constituting the crime charged. The very nature of a confession requires that the circumstances surrounding it be subjected to careful scrutiny in order to determine surely whether it was voluntary and understandingly made.

I might mention, in passing, the word, "Confession," includes statements made orally by way of confession as well as, if any there might be, any written statement or confession.

If the evidence does not convince beyond a reasonable doubt that a confession was made voluntarily and understandingly, the Jury should disregard it entirely. On the other hand, if the evidence does show beyond a reasonable doubt that a confession was in fact voluntarily and understandingly made by a defendant, the Jury should consider it as evidence against the defendant who voluntarily and understandingly made a confession, and from him alone.

A confession made outside of Court by one defendant may not be considered as evidence against another defendant not a party to such confession.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule.

A witness who by education and experience has become expert in any art, science, profession or calling, may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and also can state the reasons for such opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

[fol. 870] In the classification of expert opinions, you will recall the doctors, and the State chemists, and any others that you recall that the Court for the moment does not recall, who were qualified as experts by the questions and answers elicited from them.

Now, evidence has been introduced to establish what we call an alibi—that the defendant was not present—I am referring more specifically to Edward Romano, but that the defendant was not present at the time when and the place where he is alleged to have committed the offense charged in the indictment.

If after consideration of all the evidence you have a reasonable doubt as to whether the accused was present at the time and place that certain alleged acts were committed, you should take that into consideration with all the other evidence in determining whether or not he is guilty or innocent, keeping in mind at all times that the Government must prove the essentials of the crime beyond a reasonable doubt.

You, as Jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

A witness is presumed to speak the truth. But, this presumption may be outweighed by the manner in which the witness testifies, or the character of the testimony given, or by contradictory evidence.

You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence that tends to indicate whether the witness is worthy of belief.

Consider each witness's intelligence, motive, and state of mind, demeanor and manner while on the stand. Consider also any relation each witness may bear to either [fol. 871] side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, and inno-

cent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of the discrepancy, consider whether it pertains to a matter of importance or unimportant detail and whether the discrepancy results from innocent error or wilful falsehood.

If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

All evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused should be considered with caution and weighed with great care.

A witness may be discredited or impeached by contradictory evidence, or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

The law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may [fol. 872] be raised and no inference of any kind may be drawn from the failure of a defendant to testify.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

A defendant who wishes to testify, however, is a competent witness, and the defendant's testimony is to be judged in the same way as that of any other witness.

In every crime, there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both the act and intent beyond a reasonable doubt.

The intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear, and thus be able to give di-

rect evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But, what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly omitted. So, unless the contrary appears from the evidence, the Jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

In determining the issue as to intent, the Jury are entitled to consider any statements made and acts done [fol. 873] or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

You will note further that the acts charged in the indictment are alleged to have been done unlawfully. Unlawfully means contrary to the law. Hence, to do an act unlawfully means to do wilfully something which is contrary to law. An act is done wilfully if done voluntarily and purposely, and with specific intent to do that which the law forbids. That is to say, with bad purpose, either to disobey or to disregard the law.

* * * *

[fol. 874]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 10,284

* * * *

EXCEPTIONS TO THE CHARGE:

(In the absence of the Jury:)

Mr. MARKLE. I have only one point that I want to bring up. The only thing that I would bring up is that much has been made as to the registration of the still, and I was wondering whether it wouldn't be appropriate to so instruct the Jury, that there was evidence that no sign had been posted on the outer premises.

I believe, as I recall, that Nadel testified to this and also Shaw, and that is that a sign on a legal still is required to be posted on the outside and inside of the premises in a prominent position, and that is the only point I would make, if your Honor please!

The COURT. Mr. Flynn?

Mr. FLYNN. Your Honor charged with respect to the first and second counts on the question of knowledge and wilfulness in order to commit an unlawful or illegal act. And I believe that the charge on the first and second [fol. 875] counts with respect to all of the Defendants, since it is encompassed within the so-called Internal Revenue Code, does not completely meet the test of *United States versus Murdock*, the citation of which is 389 at pages 394 through 396.

In discussing the term, "Wilful," the Court said that it did often mean voluntarily as distinguished from accidental, but when used in a criminal statute it generally means an act done with bad purpose, without grounds for believing that it is lawful, conduct marked by a careless disregard for whether or not one has a right to so act. An evil motive is a constituent element of the crime.

These are all quotations that I am giving the Court. In other words, the carrying of the burden of showing a mere voluntary failure to act would not be sufficient. I claim would not be a sufficient charge to show the unlawful, knowing, and wilful conduct, with respect to counts one and two.

I will admit to the Court that with respect to the third count, since it is not an Internal Revenue Code count, that there is some question as to whether or not the charge on the third count would require such extensive particularization. I would note, however, that the Court did indicate on the third count that the accused would have to be found to have been guilty of a specific intent, and that a specific intent, as I understand the law of crime, would require something more than a failure to act; it would require an affirmative step with respect to each and every one of the accused.

And as I listened to the charge, I did not note the specification on wilfulness and knowledge that would comply with the so-called Murdock decision. I have not shepherdized this, but as I recall, there are a series of Second Circuit cases which carry this forward and added a number of other phrases, all of them showing evil motive, bad purpose, conscious and careless disregard for [fol. 876] the propriety of such an act, or for the right to act in such fashion.

Since the charge did not, as I listened to it, contain such a definition, I respectfully except to it.

The Court did not, as I listened to the charge, make a clear distinction between counts one and two. I have already excepted to it, or raised a constitutional claim with respect to 5601(b) and the statutory presumptions that are set forth there, but the Court did not, as I listened to the charge, clearly distinguish that the presumption could

not be inferred on the third count, and that the presumption does not attach to the third count since Section 371 of Title 18 of the United States Code is the criminal act alleged. Section 371 contains no such presumption, and it would require an inference based on another statute to attach the presumption to the third count.

I think that the Defendants are entitled, as a matter of right, to a specific request that they may not use any of the presumptions that the Court referred to in the charge with respect to the third count, since the statute does not, in addition to any constitutional objections, does not permit such a presumption to be raised.

The Court indicated in the charge, on the second count, that the production of distilled spirits by distillation or any other process. I respectfully submit that the Government has, by the Bill of Particulars it filed in this case, disclaimed any other process other than distillation. In other words, I raise the claim of law, the natural fermentation or alcoholic content is not within the purview of the Government's claim with respect to the second and third counts in the case.

The Government, as a result of a specific request made by me in a Bill of Particulars, was asked:

[fol. 877] "Does the Government claim the production of distilled spirits by any other process other than distillation."

As I recall the Bill of Particulars, it was answered in the negative. The Court referred to the definition of distillers and of a distillery, and of the violation of the second and third counts, referred to things like mash, wort, wash, and other processes. Again, the Bill of Particulars in this case limits the Government's claim to mash alone, not by wash or wort. I don't know whether or not the Jury would understand what the distinction is, because I read it in the dictionary, and it is not clear in my mind.

The COURT. Wort is fermented mash. The Court looked it up. The similarity, there is no difference.

Mr. FLYNN. There is a legal difference, since they limit it in their Bill of Particulars, the distillation, the

production of distilled spirits by distillation alone. If the definition of "wort" is that it is fermented mash and that, therefore, derives or produces a distilled spirit or produces ethyl alcohol, I claim as a matter of charge at this stage that the Court must instruct the Jury—and I don't know whether or not a member of a Jury would know that distinction—must instruct the Jury that the only way they can find there was production of distilled spirits is by distillation and by no other process.

The Court did charge that; unless they were satisfied that each individual was on the premises when distilled spirits were being produced. I respectfully submit, since this has been, as Mr. Markle said yesterday, seventeen days of trial, that each of the accused are entitled to the Court's observation at this time as to when there was evidence in the case of the production of distilled spirits; on what days and times, and who was alleged to have been present during the times when it is alleged to have [fol. 878] been proved that there were distilled spirits being produced.

Otherwise, the Jury, listening to the Court's consecutive charge with respect to what an inference is, and what a presumption is, are liable to raise an inference, and based upon that inference, they would find presumption.

I claim as a matter of law that that would be improper.

I would point out to the Court with respect to count three in the Court's charge—the Government alleged in count three, in the overt act with respect to Antonio Vellucci that he did aid in the transportation of a motor vehicle, and it was required that they answer with respect to count three the conduct that he is supposed to have performed on the third count, with respect to aiding in the transportation. Their response was he had deposited $20 for a truck on the 14th of September, and he had deposited the $200-some-odd on the 15th of September in order to purchase a specific motor vehicle.

I think the Defendant Vellucci, with respect to the third count, therefore, is entitled to a definition with respect to these overt acts, as to exactly those things which each Defendant is alleged to have done to establish an innocent or other act. And that before this, they would

have to establish on the third count the production of distilled spirits, before the overt act or the conspiracy to produce distilled spirits—and not the conspiracy to obtain the product from which distilled spirits might be produced.

The Court did refer, for example, to the fact that the purchase of sugar is in and of itself an innocent act. If the purpose of the purchase of the sugar, however, is for the production of distilled spirits, and as an example, as to the Defendant Antonio Vellucci, there is no claim, as I understand the Government's claim, there is no claim [fol. 879] that Antonio Vellucci was either present or near the premises where that sugar was being delivered.

At the same time, they never claimed an overt act on his part with respect to the acquisition of that sugar. And I believe that the evidence is clear in the case, from the Government's own witness, that he actually acquired this vehicle that he is supposed to have purchased under the third count, as his overt act, to show an overt act in furtherance of the conspiracy. He purchased this vehicle on the 27th day of September. So, it would have to be knowledge of the illegal act before, and then some overt act on his part after the establishment of not only the conspiracy, I claim, but also his joining the conspiracy.

There would have to have been some evidence. And, he was entitled to such a charge.

With respect to the Defendant Edward Romano, the charge of the Court—the Court did make a point of referring to two alleged circumstances in evidence. One is the acquisition of certain bottles that he is alleged to have acquired; second is the acquisition of the sugar.

The Court, I did not hear—the Court may have, but I did not hear the Court say that you must first find that he has joined into a conspirational situation, and then the overt act goes to establish the completion, the criminal completion of the crime.

If there is insufficient in the case to establish first that there was the conspiracy in existence, and that he was a party to it, then the overt act is an innocent act, regardless of the time that he entered the conspiracy.

By way of example, if you join the conspiracy October 1st, any conduct of his on September 15th would not be evidence from which the Jury could reasonably infer guilt [fol. 880] on count three, or up to October 1st, up to the time that he joined the conspiracy.

Finally, I heard the Court's charge, and I respectfully submit it would be very easy for the Jury to confuse evidence which has been introduced with respect to the third count, as having a foundation and basis for the establishment of proof on count number two. And, it would seem that the Jury might well, with respect to the distinctions—and again I go to the presumption situation—the Jury might very well reasonably infer that if there is guilt on the second count, then it follows, like the night the day, that there must be guilt with respect to count three.

I noted that the Court did not at any time refer to the Government's specific claims of proof as alleged in the Bill of Particulars. And I think with respect to each of the accused, that I represent, where the Government has been required by the Court to specify the nature of the act, that that is an integral part of the charge against each of these accused, and that the Defendants are entitled to have a charge directed specifically to the Bill of Particulars.

And that the accused are entitled to a charge that the Jury must limit its consideration to the particulars as claimed by the Government.

I did not hear it; if the Court feels it was there, it may be that I was making some notes, or I missed that portion of the charge.

For those reasons, your Honor, I respectfully except to the charge.

The COURT. Anything further, counselor?

Mr. MARKLE. No, sir.

[fol. 881] The COURT. In regard to the use of the word, "Mash," rather than "mash water" or "wash," counselor, looking at your Bill of Particulars under Paragraph Ten, it says, "What other materials" are the Defendants alleged to have used to produce distilled spirits? What other materials referred to is not too clear. Then, in

answer to that, the Government's Bill of Particulars says, "No other material."

Now, in the indictment, the second count says, "Mash water and other materials," and the question was: "What other materials?"

And then, "No other."

Therefore, the inference is mash water and wash was still retained. The other materials would not be found, and not be included.

That is the Court's interpretation. But, the word, "Mash," was never used or limited as such.

The other question counsel brought up about distillation: "By what process other than distillation did the United States offer proof that the Defendants produced distilled spirits?"

And the answer to that was, "No other process."

I think the Court might emphasize as one point, counselor, that they are limited in their consideration to the production of distilled spirits by distillation. I think that point might be well-taken.

As to whether the Bill of Particulars would be enlightening to the Jury or confusing by the recitation of dates and the names of parties, is clearly questionable in the mind of the Court. Whereas, the Bill of Particulars is primarily used to appraise the defense counsel of what is claimed, so he may prepare his case. The abbreviated [fol. 882] recitation of dates and names at this time would appear to the Court to be more confusing than enlightening. The Court feels it should not be read to the Jury at this time.

Mr. FLYNN. Might I expect, your Honor, that they would not also be available to the Jury for their consideration?

The COURT. That is understood.

Mr. FLYNN. But my objection to that procedure, then, would be noted for the record?

The COURT. And you still feel it should be read to them, however?

Mr. FLYNN. I still believe, your Honor, that the Jury should be required to limit their considerations to the particularized claim of illegal conduct of each of these

accused, and that the general statement of statutory reference is insufficient, since the Government has been required by the Court to put it in more specific language.

Mr. MARKLE. Well, if the Court please, if that is true, then I think the Jury would be entitled to a full explanation as to each and every fact pertaining thereto, and having a bearing on, and we would like a long explanation of the evidence in the case.

The COURT. The Court feels it would be more confusing to the Jury than helpful.

Does Counsel for the Defendants have any observation about the Government's request of calling the attention of the Jury to the fact that no sign had been posted on the exterior of the premises?

Mr. FLYNN. I think he testified to the interior, as I recall it.

[fol. 883] Mr. MARKLE. It was interior and exterior. I covered both. Either by Nadel and Shaw, or Nadel alone. And I am pretty sure I did it by Nadel, then buttressed it by Shaw.

Mr. FLYNN. It does not seem to me that would be in any way an explanation of the law. It is kind of drilling a hole into the Jury's mind, so that they couldn't possibly overlook a specific item of evidence that the Government claims. I would object to it.

I know the Court would couch the language as fairly as it could, but I would have difficulty at this time understanding how a reference to the testimony of one witness—

The COURT. The Court will deny all requests to charge the Jury, except one, and that is in reference to the line wherein they are limited to the consideration of the Defendants, under the second and third counts, to the production of distilled spirits in a distillation process, and not by fermentation, because that is in the Bill of Particulars.

You will recall the Jury for that one added observation.

* * * *

[fols. 884-919] * * *

[fol. 920]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 158—September Term, 1963.

Argued January 6, 1964

* * * *

Docket No. 28227

UNITED STATES OF AMERICA, APPELLEE

v.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO and ANTONIO VELLUCCI, APPELLANTS

Before:

LUMBARD, *Chief Judge*,
KAUFMAN and MARSHALL, *Circuit Judges*.

Appeal from judgment of conviction of the District Court of Connecticut, T. Emmet Clarie, *J.*, for violation of 26 U.S.C. §§ 5601(a)(1) and 5601(a)(8), and 18 U.S.C. § 371.

Affirmed, except as to the convictions of Frank Romano and John Ottiano on counts 1 and 2 which are reversed.

ARNOLD MARKLE, Assistant U. S. Attorney, New Haven, Connecticut (Robert C. Zampano, United States Attorney for the District of Connecticut, New Haven, Connecticut, on the brief), *for appellee*.

[fol. 921] W. PAUL FLYNN, New Haven, Connecticut (Frank J. Raccio, Kopkind and Flynn, New Haven, Connecticut, on the brief), *for appellants.*

OPINION—March 25, 1964

LUMBARD, *Chief Judge:*

Appellants Frank Romano and John Ottiano were found guilty by the jury of violating 26 U. S. C. § 5601 (a) (1), possession of a distilling apparatus not registered as required by 26 U. S. C. § 5179(a). With appellants Edward Romano and Antonio Vellucci, they were also found guilty of violating § 5601(a) (8), producing distilled spirits when not being authorized to do so by the law, and of conspiring to violate § 5601(a) (8), 18 U. S. C. § 371. Of all the issues raised by the defendants-appellants as supporting a reversal of their convictions we find merit in only one—the invalidity of the statutory presumptions of 26 U. S. C. §§ 5601(b) (1) and (4) which were invoked as to two appellants on counts 1 and 2. We therefore affirm the judgment of conviction of all the appellants on the conspiracy charge, count 3, and the conviction of Edward Romano and Antonio Vellucci on count 2 for the unlawful production of distilled spirits. We reverse the convictions of Frank Romano and John Ottiano on counts 1 and 2.

The events leading to the issue of a search warrant and its subsequent execution are undisputed. On October 10, 1960, between 10:30 and 11:00 P. M., Agents Nadel and Sushman of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, together with a State Police Officer, went to the site of the "Aspinook Mill" in Jewett City, Connecticut. "Aspinook Mill," owned by the Griswold Corporation, was a large complex of industrial buildings covering 42 acres of land. The agents had information that there was an illegal distilling apparatus [fol. 922] located in the extreme northwest corner of the

industrial complex. After gaining entrance through a hole in the fence, the agents proceeded through a series of buildings belonging to the Griswold Corporation which were not leased or occupied. They reached a position in an alleyway from where they detected the distinct odor of fermenting mash coming from the building known as building 9A, located in the northwest corner of the complex. They then left via their route of entry. That same evening between 7:00 P. M. and 10:00 P. M. another agent, Shaw, was located on high ground across the river bordering the industrial complex. Using binoculars, he observed the interior of building 9A where he saw a column still and other items used in the distilling of liquor. Agents Shaw and Sushman then applied to Chief Judge Anderson for a warrant to search building 9A on the basis of their affidavits in which they set forth their observations made on the evening of October 10, and the fact that no registration certificate had been issued by the Treasury Department permitting the distilling of spirits on those premises. Chief Judge Anderson issued the warrant to Shaw and Sushman on October 11.

At 7:30 A. M. on October 13, Shaw, with Federal Agents Norton and Nadel and Connecticut State Police Officers Marikle and Hart, after demanding entry and receiving no answer, forced the front door to building 9A. On the other side of the door was a 753-gallon capacity still and 9 mash vats which contained approximately 5756 gallons of mash. Appellants Frank Romano and John Ottiano were standing several feet from the still. In addition, they found a few hundred Knox glass jugs, 40 sixty-pound bags of Domino sugar and a plywood partition together with other equipment listed in the return. In Ottiano's pocket the agents found the keys to the doors of the building and the lock on the front gate to the mill property. Frank Romano told the agents that he did not know how long the still had been in operation [fol. 923] and that he had been there four days. He showed the agents how to turn off the motor.

As to Antonio Vellucci and Edward Romano, there was testimony that these two shopped together for and purchased a 1960 Ford truck in Vellucci's name about

a month before the seizure of the still. There was testimony that this Ford truck was used on several occasions to pick up both Knox jugs and sixty-pound bags of Domino sugar, and Edward Romano and Frank Romano were identified as the drivers of the Ford truck on these occasions. On October 2 the watchman for the industrial complex observed the truck at the still site carrying bags of Domino sugar. When Edward Romano saw the watchman observing the truck, he covered the sugar with canvas. The watchman also saw Edward Romano and John Ottiano at the still site carrying the partition and the toilet that were found in building 9A at the time of the raid.

Vellucci was often seen in the company of Edward Romano during the few weeks preceding the raid. When questioned by an agent at his home shortly after the seizure, Vellucci asserted that his health had been such as to prevent his operating the truck, and that he had left the truck with the keys in the ashtray a few days before the truck was used by the Romanos. The hospital records which Vellucci claimed would substantiate his disability did not in fact do so. The evidence is sufficient to sustain convictions on all counts.

The appellants' first claim of error is that the execution of the search warrant violated the Fourth Amendment. They assert that the information supporting the issuance of the search warrant was obtained as a result of a trespass and that this trespass invalidates the warrant and the evidence gained as a result of its use. We disagree. The appellants have no standing to complain of any trespass. They were not the owners or possessors of [fol. 924] the area of land over which the agents traversed in order to gain a position from which they could smell the aroma of fermenting mash coming from building 9A. In any event, it is well settled that evidence is not rendered inadmissible merely because it has been obtained in the course of a simple trespass on land. The protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," does not extend to open fields, or to unoccupied buildings. *Hester* v. *United States*, 265 U.S. 57. Moreover, the

affidavit of Agent Shaw, who, from without the building and land area in question, observed the operation of the still with the aid of binoculars, and the statement in Shaw's affidavit that no still was licensed for these premises constituted sufficient probable cause to justify the issuance of the search warrant by Chief Judge Anderson.

After the execution of the warrant the agents dismantled the still and destroyed some of the property that was there found. The appellants argue that as the government destroyed some of the evidence seized they could not determine whether some of the items destroyed could have served some useful purpose in the defense of the charges. The appellants have failed to show that they suffered any prejudice by reason of the destruction. The essential elements of the still were not destroyed and were available for inspection. Photographs and movies were made prior to dismantling and these were also available to the defendants. The magnitude of this distilling operation made it impracticable to remove the apparatus intact. The destruction of illegal stills and their appurtenances is authorized by 26 U. S. C. A. § 5609 in those cases where "it is impracticable to remove the still and distilling material to a place of safe storage from the place where seized." The distinct hazard of fire as well as the caretaking difficulties involved are further reasons which justify the destruction of such a still under the statute, and in this particular case.

[fol. 925] The claim that the defense, during trial, was improperly denied access to the entire written report of Agent Nadel is without any basis. Nadel's statements were made available when he testified. The only parts of his report not made available then were reports from other agents which he had incorporated in his report. Such reports of other witnesses were made available when those witnesses were called to testify. The defense was given everything to which it was entitled, at the proper time; if the reports of other agents, which Nadel had neither approved nor disapproved, would have been helpful in questioning Nadel, the defense might have asked that he be recalled. This they failed to do.

We come to the one meritorious claim by the appellants. This related to Judge Clarie's instruction to the jury as to counts 1 and 2, informing them of the presumptions in 26 U. S. C. §§ 5601(b)(1) and (4). With regard to count 1, charging unlawful possession of a distilling apparatus, Judge Clarie read § 5601(b)(1) as follows:

> "(b) Presumptions—
>
> "(1) Unregistered stills.—Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury."

Judge Clarie also advised the jury with regard to count 2, which charged the defendants with producing distilled spirits without being authorized by law to do so, that the [fol. 926] similar presumption set out in § 5601(b)(4) may be applied,[1] where a defendant is shown to have been at the still site. These presumptions of course could apply only to the defendants Frank Romano and John Ottiano who were found present at the still site where spirits were being illegally produced. Although these presumptions do not require the jury to conclude from the unexplained presence of the defendant at the still site that the defendant is in possession and control of the still, the result is, nonetheless, that with no other evidence against the defendant the jury may find the defendant guilty as charged.

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[1] Title 26, § 5601(b)(4) provides in part:

> "(4) Whenever on trial for violation of subsection (a)(8), that is, producing, distilled spirits, the defendant is shown to have been at the site or place and at the time when such distilled spirits were produced by distillation or any other process from mash, wort, wash or other materials, such presence of the defendant shall be deemed sufficient evidence to authorize conviction unless the defendant explains such presence to the satisfaction of the jury."

We are of the view that to apply these presumptions to persons shown to have been at the still would violate the due process clause of the Fifth Amendment. *Barrett* v. *United States*, 322 F. 2d 292 (5 Cir. 1963), certiorari granted 375 U. S. 962 (1964). Proof of the fact on which the statutory presumption is based, namely presence, must carry a reasonable inference of the ultimate fact presumed, namely that the person is in possession of the still or is distilling spirits. The inference here is too strained and is not reasonably related to the fact proved. For example, one found present at a still may as well be a purchaser of the distilled product or a visitor for some other business purpose.

The presumptions here involved are totally unlike the one created when unexplained possession of narcotic [fol. 927] drugs is shown.[2] For the "legitimate possession of opium is so highly improbable that to say to any person who obtains the outlawed commodity, 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you

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[2] 21 U. S. C. § 173 provides in part:

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, . . ."

21 U. S. C. § 174 penalizes:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . ." and then provides:

"Whenever on trial for violation of this section the defendant is shown to have or to have had posession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

must at your peril ascertain and be prepared to show the facts and circumstances which tend to rebut, the natural inference of unlawful operation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress." *Yee Hem* v. *United States*, 268 U. S. 178 (1925).[3] We find that the presumptions set out in §§ 5601(b)(1) and (4) fall outside the constitutional power of Congress. There is no broad ground of experience which supports the conclusion that people present at a still site are in possession [fol. 928] or control of the distilling operation on that site in such a large proportion of such instances that a jury may be instructed that it may draw such a conclusion in the absence of any explanation.

While the evidence against Frank Romano and John Ottiano, apart from the presumptions, was ample, we cannot speculate as to what weight the jury might have given to the presumptions in reaching its finding of guilt on these two counts. Therefore the convictions of these two defendants under counts 1 and 2 must be reversed. As Judge Clarie made it clear that the presumptions were limited to those present and to counts 1 and 2 only, and as proof of the conspiracy was more than sufficient to sustain the verdict on count 3, we affirm the convictions on count 3 and we affirm the convictions of Edward Romano and John Vellucci under count 2.

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[3] But where there is proof that a particular kind of narcotic drug is domestically produced in quantity, the presumption of knowledge of illegal importation has been found without rational foundation, and hence unconstitutional. *Erwing* v. *United States*, 323 F.2d 674 (9 Cir. 1963), see also *United States* v. *Gibson*, 310 F. 2d 79 (2 Cir. 1962).

[fol. 929]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, Chief Judge,

HON. IRVING R. KAUFMAN,

HON. THURGOOD MARSHALL,
Circuit Judges

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO, ANTONIO VELLUCCI, DEFENDANTS-APPELLANTS

SAMUEL I. COHEN, ET AL., THE GRISWOLD CORPORATION OF JEWETT CITY, CONNECTICUT, DEFENDANTS

Appeal from the United States District Court
for the District of Connecticut

JUDGMENT—March 25, 1964

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed as to the conviction of all appellants on count 3.

It is further ordered, adjudged and decreed that the judgments of said District Court as to Edward Romano and Antonio Vellucci, be and they hereby are affirmed on count 2.

It is further ordered, adjudged and decreed that the judgments of said District Court as to Frank Romano and John Ottiano be and they hereby are reversed on counts 1 and 2.

A. DANIEL FUSARO
Clerk

[fol. 930]

[File Endorsement Omitted]

[fol. 931-933] * * *

[fol. 934]

APPELLANTS' PETITION FOR REHEARING—filed April 14, 1964

[omitted in printing]

[fol. 935-938] * * *

[fol. 939]

APPELLEE'S PETITION FOR RE-HEARING—filed April 14, 1964

[omitted in printing]

[File Endorsement Omitted]

[fol. 940-941] * * *

[fol. 942]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 158—September Term, 1963

Motions filed April 14, 1964

* * * *

Docket No. 28227

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO and ANTONIO VELLUCCI, DEFENDANTS-APPELLANTS

Appellee's Motion for Rehearing
Appellants' Motion for Rehearing and Stay of Mandate in the Event Rehearing Is Denied

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Before:

LUMBARD, *Chief Judge,*
KAUFMAN and MARSHALL, *Circuit Judges.*

ROBERT C. ZAMPANO, United States Attorney, District of Connecticut and Anthony G. Apicella, Assistant United States Attorney, District of Connecticut, on the brief *for appellee.*

[fol. 943]

W. PAUL FLYNN, New Haven, Connecticut, on the brief *for appellants.*

OPINION—April 21, 1964

PER CURIAM:

The petition of the appellants and the petition of the appellee are both denied.

The appellants' claim that they were prejudiced by the alleged failure of the government to have a stenographer make notes of all the testimony before the grand jury is disposed of not only by *United States* v. *Costello*, 255 F. 2d 389 (8 Cir.), cert. denied, 385 U. S. 830 (1958), which holds that the district court need not inquire into the sufficiency of evidence before the grand jury, but also by the fact that the appellants' counsel has been unable to demonstrate in his original brief and at the argument before this court that there could have been any possible prejudice to the appellants by reason of incomplete transcription of grand jury testimony.

There was no showing and there is no reason to believe that appellants were at any time denied full disclosure of any grand jury testimony which was transcribed and which contained any statements inconsistent with the trial testimony of any witness. Such grand jury testimony as was available and reflected any possible inconsistencies was in fact turned over to defense counsel.

The other points which the appellants wish us to reconsider are entirely without merit.

The appellants' motion for a stay of the mandate pending application to the Supreme Court for a writ of certirari is denied.

[fol. 944]

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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* * * *

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO, ANTONIO VELLUCCI, DEFENDANTS-APPELLANTS,

SAMUEL I. COHEN, ET AL., THE GRISWOLD CORPORATION OF JEWETT CITY, CONNECTICUT, DEFENDANTS

ORDER DENYING PETITIONS FOR REHEARING—April 21, 1964

A petition for rehearing having been filed herein by counsel for the appellee and a petition for rehearing together with a motion to stay the issuance of mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that the petition for rehearing of the appellee and the petition for rehearing of the appellants be and they hereby are denied.

Further ordered that the appellants' motion to stay the issuance of the mandate be and it hereby is denied.

A. DANIEL FUSARO
Clerk

[fol. 945]

[File Endorsement Omitted]

[fol. 946]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 947]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1963

UNITED STATES, PETITIONER

vs

FRANK ROMANO AND JOHN OTTIANO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 21, 1964

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 10th, 1964

/s/ John M. Harlan
Associate Justice of the Supreme Court of the United States.

Dated this 21st day of May 1964

[fol. 948] * * *

[fol. 949]

SUPREME COURT OF THE UNITED STATES

No. 172, October Term, 1964

UNITED STATES, PETITIONER

v.

FRANK ROMANO, ET AL.

ORDER ALLOWING CERTIORARI.—March 15, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 773870 815

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK ROMANO AND JOHN OTTIANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review those portions of the judgment of the United States Court of Appeals for the Second Circuit which reversed respondents' convictions for possessing an unregistered still (Count 1) and for the unauthorized production of distilled spirits (Count 2).

OPINION BELOW

The opinion of the court of appeals (App., *infra*, pp. 8–16) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 16) was entered on March 25, 1964. A petition for rehearing was denied on April 21, 1964. By order of Mr. Justice Harlan, dated May 21, 1964, the time for filing a petition for a writ of certiorari was extended to June 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

732-017—64——1

QUESTION PRESENTED

Whether the presumptions established by section 5601(b) (1) and (4) of the Internal Revenue Code, as here applied, satisfy the requirements of the due process clause of the Fifth Amendment.

STATUTE INVOLVED

Section 5601 of the Internal Revenue Code of 1954, as added by 72 Stat. 1398–1399, 26 U.S.C. 5601, provides in pertinent part:

> (a) OFFENSES.
>
> Any person who—
>
> (1) UNREGISTERED STILLS.
>
> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or
>
> * * * * *
>
> (8) UNLAWFUL PRODUCTION OF DISTILLED SPIRITS.
>
> Not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material or * * *
>
> (b) PRESUMPTIONS.
>
> (1) UNREGISTERED STILLS.
>
> Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such

presence to the satisfaction of the jury (or of the court when tried without jury).

* * * * *

(4) UNLAWFUL PRODUCTION OF DISTILLED SPIRITS.

Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, respondents and two others (Edward Romano and Antonio Vellucci) were convicted on an indictment (R. 30–32)[1] charging violations of the provisions of the Internal Revenue Code relating to illegal distilling operations, and of conspiracy to violate one of those provisions. Count one charged respondents with possession, custody and control of an unregistered still and distilling apparatus (26 U.S.C. 5601(a)(1)); count two, with illegal production of distilled spirits (26 U.S.C. 5601(a)(8)); and count three, with conspiracy to produce distilled spirits illegally. Frank Romano was fined $10,000 on count one and was sentenced to concurrent three-year terms of imprison-

[1] "R." designates the two-volume appendix to respondents' brief in the court of appeals.

ment on each of the three counts. John Ottiano was fined $5,000 on count one and sentenced to concurrent two-year terms on each count (R. 829–832).

The court of appeals affirmed the conviction on the conspiracy count, but reversed on the substantive counts, holding that the presumptions created by Section 5601(b) (1) and (4), on which the jury was charged, were unconstitutional.[2]

The relevant evidence reveals that in the late evening of October 10, 1960, agents of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, went to the site of a large industrial complex in Jewett City, Connecticut, at which an illegal distilling operation was reportedly being conducted. After entering the premises through a hole in a fence and proceeding down an alleyway, the agents detected the distinct odor of fermenting mash emanating from a building, known as 9A, which was located in the northwest corner of the site. They then departed by the same route they had come. Earlier that evening another agent, posted on high ground overlooking the site, and using binoculars, had scanned the interior of building 9A and seen a column still and other materials used in the distillation of alcohol (R. 21–25; App., *infra*, p. 9).

On the basis of these observations, the federal

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agents obtained a search warrant the next day for

[2] The court affirmed the conviction of all four defendants on the conspiracy count and of Edward Romano and Antonio Vellucci on the substantive count in which they were named (count two), since under the judge's charge the presumptions were not applicable.

building 9A. Upon executing the warrant, they found the building to contain a 753-gallon still in full operation, and 9 mash vats containing approximately 5,756 gallons of mash. Additional paraphernalia used in the distillation process (*e.g.*, hundreds of glass jugs and numerous bags of sugar) were also discovered on the premises (R. 226–229, 250; App., *infra*, p. 10). The respondents were found inside the building standing a few feet from the still (R. 336–337). In Ottiano's pocket, the agents found the keys to the doors of the building. Both men informed the agents that they did not know how long the still had been in operation, Romano adding that he had been at the premises for three days. Romano showed the agents how to turn off the still motor (R. 213–214, 221, 239).

The trial judge instructed the jury as to the presumptions established by 26 U.S.C. 5601(b) (1) and (4) (*supra*, pp. 2–3), limiting their application to the first two substantive counts and to the persons present at the site when the still was discovered by the law enforcement officers. In holding the presumptions invalid, the court of appeals relied upon the decision of the Fifth Circuit in *Barrett* v. *United States*, 322 F. 2d 292, certiorari granted, 375 U.S. 962. The court stated (App., *infra*, p. 15):

> There is no broad ground of experience which supports the conclusion that people present at a still site are in possession or control of the distilling operation on that site in such a large proportion of such instances that a jury may be instructed that it may draw such a conclusion in the absence of any explanation.

REASONS FOR GRANTING THE WRIT

This Court has already granted the government's petition for certiorari in *Barrett* v. *United States*, 322 F. 2d 292, certiorari granted, 375 U.S. 962, in which the Fifth Circuit held that the statutory presumptions established by subsections (b)(1) and (b)(2) of Section 5601 of the Internal Revenue Code do not meet the test of rational connection and thus violate the due process clause of the Fifth Amendment. The present case involves the validity not only of subsection (b)(1), but also of subsection (b)(4), which is not presented in *Barrett*. Consideration of the two cases would enable the Court to evaluate the validity of all but one of the presumptions involved in the statutory scheme.

Full review of the statute is desirable because there is serious doubt of the correctness of the view, expressed in *Barrett* and accepted by the court below, that if the presumption contained in section 5601(b)(1) is violative of due process, the other presumptions of section 5601(b) must also fall. Thus, different considerations may well pertain to a presumption of possession, custody and control based upon presence at the site of an unregistered still (subsection (b)(1)) and a presumption of involvement in production on the basis of presence at a still at the very time when illegal production is actively taking place (subsection (b)(4)). Experience and common sense furnish a particularly strong basis to support the proposition that persons present at a still while it is actually in

operation are involved in that operation. Sightseers are not welcome at a time when illegal operations are actually being conducted.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted and this case heard together with *Barrett* v. *United States*, 322 F. 2d 292, certiorari granted, 375 U.S. 962.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

MAY 1964.

APPENDIX

United States Court of Appeals for the Second Circuit

No. 158—September Term, 1963

ARGUED JANUARY 6, 1964. DECIDED MARCH 25, 1964.

Docket No. 28227

UNITED STATES OF AMERICA, APPELLEE

v.

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO AND ANTONIO VELLUCCI, APPELLANTS

Before: LUMBARD, Chief Judge, KAUFMAN and MARSHALL, Circuit Judges

LUMBARD, Chief Judge:

Appellants Frank Romano and John Ottiano were found guilty by the jury of violating 26 U.S.C. § 5601 (a)(1), possession of a distilling apparatus not registered as required by 26 U.S.C. § 5179(a). With appellants Edward Romano and Antonio Vellucci, they were also found guilty of violating § 5601(a)(8), producing distilled spirits when not being authorized to do so by the law, and of conspiring to violate § 5601(a)(8), 18 U.S.C. § 371. Of all the issues raised by the defendants-appellants as supporting a reversal of their convictions we find merit in only one—the invalidity of the statutory presumptions of 26 U.S.C. §§ 5601 (b) (1) and (4) which were invoked as to two appellants on counts 1 and 2. We therefore affirm the judgment of conviction of all the appellants on the

conspiracy charge, count 3, and the conviction of Edward Romano and Antonio Vellucci on count 2 for the unlawful production of distilled spirits. We reverse the convictions of Frank Romano and John Ottiano on counts 1 and 2.

The events leading to the issue of a search warrant and its subsequent execution are undisputed. On October 10, 1960, between 10:30 and 11:00 P.M., Agents Nadel and Sushman of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, together with a State Police Officer, went to the site of the "Aspinook Mill" in Jewett City, Connecticut. "Aspinook Mill," owned by the Griswold Corporation, was a large complex of industrial buildings covering 42 acres of land. The agents had information that there was an illegal distilling apparatus located in the extreme northwest corner of the industrial complex. After gaining entrance through a hole in the fence, the agents proceeded through a series of buildings belonging to the Griswold Corporation which were not leased or occupied. They reached a position in an alleyway from where they detected the distinct odor of fermenting mash coming from the building known as building 9A, located in the northwest corner of the complex. They then left via their route of entry. That same evening between 7:00 P.M. and 10:00 P.M. another agent, Shaw, was located on high ground across the river bordering the industrial complex. Using binoculars, he observed the interior of building 9A where he saw a column still and other items used in the distilling of liquor. Agents Shaw and Sushman then applied to Chief Judge Anderson for a warrant to search building 9A on the basis of their affidavits in which they set forth their observations made on the evening of October 10, and the fact that no

782-017—64——2

registration certificate had been issued by the Treasury Department permitting the distilling of spirits on those premises. Chief Judge Anderson issued the warrant to Shaw and Sushman on October 11.

At 7:30 A.M. on October 13, Shaw, with Federal Agents Norton and Nadel and Connecticut State Police Officers Marikle and Hart, after demanding entry and receiving no answer, forced the front door to building 9A. On the other side of the door was a 753-gallon capacity still and 9 mash vats which contained approximately 5756 gallons of mash. Appellants Frank Romano and John Ottiano were standing several feet from the still. In addition, they found a few hundred Knox glass jugs, 40 sixty-pound bags of Domino sugar and a plywood partition together with other equipment listed in the return. In Ottiano's pocket the agents found the keys to the doors of the building and the lock on the front gate to the mill property. Frank Romano told the agents that he did not know how long the still had been in operation and that he had been there four days. He showed the agents how to turn off the motor.

As to Antonio Vellucci and Edward Romano, there was testimony that these two shopped together for and purchased a 1960 Ford truck in Vellucci's name about a month before the seizure of the still. There was testimony that this Ford truck was used on several occasions to pick up both Knox jugs and sixty-pound bags of Domino sugar, and Edward Romano and Frank Romano were identified as the drivers of the Ford truck on these occasions. On October 2 the watchman for the industrial complex observed the truck at the still site carrying bags of Domino sugar. When Edward Romano saw the watchman observing the truck, he covered the sugar with canvas. The watchman also saw Edward Romano and John Ottiano at the still site carrying

the partition and the toilet that were found in building 9A at the time of the raid.

Vellucci was often seen in the company of Edward Romano during the few weeks preceding the raid. When questioned by an agent at his home shortly after the seizure, Vellucci asserted that his health had been such as to prevent his operating the truck, and that he had left the truck with the keys in the ashtray a few days before the truck was used by the Romanos. The hospital records which Vellucci claimed would substantiate his disability did not in fact do so. The evidence is sufficient to sustain convictions on all counts.

The appellants' first claim of error is that the execution of the search warrant violated the Fourth Amendment. They assert that the information supporting the issuance of the search warrant was obtained as a result of a trespass and that this trespass invalidates the warrant and the evidence gained as a result of its use. We disagree. The appellants have no standing to complain of any trespass. They were not the owners or possessors of the area of land over which the agents traversed in order to gain a position from which they could smell the aroma of fermenting mash coming from building 9A. In any event, it is well settled that evidence is not rendered inadmissible merely because it has been obtained in the course of a simple trespass on land. The protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," does not extend to open fields, or to unoccupied buildings. *Hester* v. *United States*, 265 U.S. 57. Moreover, the affidavit of Agent Shaw, who, from without the building and land area in question, observed the operation of the still with the aid of binoculars, and the statement in Shaw's affidavit that no still was licensed for these premises

constituted sufficient probable cause to justify the issuance of the search warrant by Chief Judge Anderson.

After the execution of the warrant the agents dismantled the still and destroyed some of the property that was there found. The appellants argue that as the government destroyed some of the evidence seized they could not determine whether some of the items destroyed could have served some useful purpose in the defense of the charges. The appellants have failed to show that they suffered any prejudice by reason of the destruction. The essential elements of the still were not destroyed and were available for inspection. Photographs and movies were made prior to dismantling and these were also available to the defendants. The magnitude of this distilling operation made it impracticable to remove the apparatus intact. The destruction of illegal stills and their appurtenances is authorized by 26 U.S.C.A. § 5609 in those cases where "it is impracticable to remove the still and distilling material to a place of safe storage from the place where seized." The distinct hazard of fire as well as the caretaking difficulties involved are further reasons which justify the destruction of such a still under the statute, and in this particular case.

The claim that the defense, during trial, was improperly denied access to the entire written report of Agent Nadel is without any basis. Nadel's statements were made available when he testified. The only parts of his report not made available then were reports from other agents which he had incorporated in his report. Such reports of other witnesses were made available when those witnesses were called to testify. The defense was given everything to which it was entitled, at the proper time; if the reports of

other agents, which Nadel had neither approved nor disapproved, would have been helpful in questioning Nadel, the defense might have asked that he be recalled. This they failed to do.

We come to the one meritorious claim by the appellants. This related to Judge Clarie's instruction to the jury as to counts 1 and 2, informing them of the presumptions in 26 U.S.C. §§ 5601(b) (1) and (4). With regard to count 1, charging unlawful possession of a distilling apparatus, Judge Clarie read § 5601(b)(1) as follows:

> "(b) Presumptions—
> "(1) Unregistered stills.—Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury."

Judge Clarie also advised the jury with regard to count 2, which charged the defendants with producing distilled spirits without being authorized by law to do so, that the similar presumption set out in § 5601 (b)(4) may be applied,[1] where a defendant is shown to have been at the still site. These presumptions of course could apply only to the defendants Frank Romano and John Ottiano who were found present at

[1] Title 26, § 5601(b)(4) provides in part:

"(4) Whenever on trial for violation of subsection (a)(8), that is, producing, distilled spirits, the defendant is shown to have been at the site or place and at the time when such distilled spirits were produced by distillation or any other process from mash, wort, wash or other materials, such presence of the defendant shall be deemed sufficient evidence to authorize conviction unless the defendant explains such presence to the satisfaction of the jury."

the still site where spirits were being illegally produced. Although these presumptions do not require the jury to conclude from the unexplained presence of the defendant at the still site that the defendant is in possession and control of the still, the result is, nonetheless, that with no other evidence against the defendant the jury may find the defendant guilty as charged.

We are of the view that to apply these presumptions to persons shown to have been at the still would violate the due process clause of the Fifth Amendment. *Barrett* v. *United States,* 322 F. 2d 292 (5 Cir. 1963), certiorari granted 375 U.S. 962 (1964). Proof of the fact on which the statutory presumption is based, namely presence, must carry a reasonable inference of the ultimate fact presumed, namely that the person is in possession of the still or is distilling spirits. The inference here is too strained and is not reasonably related to the fact proved. For example, one found present at a still may as well be a purchaser of the distilled product or a visitor for some other business purpose.

The presumptions here involved are totally unlike the one created when unexplained possession of narcotic drugs is shown.[2] For the "legitimate possession

[2] 21 U.S.C. § 173 provides in part:

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, * * *"

21 U.S.C. § 174 penalizes:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, con-

of opium is so highly improbable that to say to any person who obtains the outlawed commodity, 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which tend to rebut, the natural inference of unlawful operation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress." *Yee Hem* v. *United States*, 268 U.S. 178 (1925).[3] We find that the presumptions set out in §§ 5601(b) (1) and (4) fall outside the constitutional power of Congress. There is no broad ground of experience which supports the conclusion that people present at a still site are in possession or control of the distilling operation on that site in such a large proportion of such instances that a jury may be instructed that it may draw such a conclusion in the absence of any explanation.

While the evidence against Frank Romano and John Ottiano, apart from the presumptions, was ample, we cannot speculate as to what weight the jury might have given to the presumptions in reaching its

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cealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * *" and then provides:

"Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

[3] But where there is proof that a particular kind of narcotic drug is domestically produced in quantity, the presumption of knowledge of illegal importation has been found without rational foundation, and hence unconstitutional. *Erwing* v. *United States*, 323 F. 2d 674 (9 Cir. 1963), see also *United States* v. *Gibson*, 310 F. 2d 79 (2 Cir. 1962).

finding of guilt on these two counts. Therefore the convictions of these two defendants under counts 1 and 2 must be reversed. As Judge Clarie made it clear that the presumptions were limited to those present and to counts 1 and 2 only, and as proof of the conspiracy was more than sufficient to sustain the verdict on count 3, we affirm the convictions on count 3 and we affirm the convictions of Edward Romano and John Vellucci under count 2.

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of March one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed as to the conviction of all appellants on count 3.

It is further ordered, adjudged and decreed that the judgments of said District Court as to Edward Romano and Antonio Vellucci, be and they hereby are affirmed on count 2.

It is further ordered, adjudged and decreed that the judgments of said District Court as to Frank Romano and John Ottiano be and they hereby are reversed on counts 1 and 2.

U.S. GOVERNMENT PRINTING OFFICE:1934

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 2

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK ROMANO AND JOHN OTTIANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 123–130) is reported at 330 F. 2d 566.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1964 (R. 131–132). Petitions for rehearing were denied on April 21, 1964 (R. 134–136). The time within which to file a petition for a writ of certiorari was extended to June 10, 1964 (R. 137). The petition was filed on that date and was granted on March 15, 1965 (R. 138; 380 U.S. 941). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory inferences established by section 5601(b) (1) and (4) of the Internal Revenue Code are constitutionally valid.

STATUTE INVOLVED

Section 5601 of the Internal Revenue Code of 1954, as added by 72 Stat. 1398–1400, 26 U.S.C. 5601, provides in pertinent part:

> (a) OFFENSES.
>
> Any person who—
>
> (1) *Unregistered stills.*
>
> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or
>
> * * * * *
>
> (8) *Unlawful production of distilled spirits.*
>
> Not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material * * *.
>
> (b) PRESUMPTIONS.
>
> (1) *Unregistered stills.*
>
> Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such

presence to the satisfaction of the jury (or of the court when tried without jury).

* * * * *

(4) *Unlawful production of distilled spirits.*

Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, respondents and two others (Edward Romano and Antonio Vellucci) were convicted on an indictment (R. 2–4) charging violations of the provisions of the Internal Revenue Code relating to illegal distilling operations, and of conspiracy to violate one of these provisions. Count one charged respondents with possession, custody and control of an unregistered still and distilling apparatus (26 U.S.C. 5601(a)(1)); count two, with illegal production of distilled spirits (26 U.S.C. 5601 (a)(8)); and count three, with conspiracy to produce distilled spirits illegally. Frank Romano was fined $10,000 on count one and was sentenced to concurrent three-year terms of imprisonment on the three counts. John Ottiano was fined $5,000 on count one and

sentenced to concurrent two-year terms (R. 82–85).

The court of appeals affirmed respondents' convictions on the conspiracy count, but reversed on the substantive counts, holding that the inferences created by section 5601(b) (1) and (4), on which the jury was charged, were unconstitutional (R. 123–130; 330 F. 2d 566).[1]

The evidence showed that in the late evening of October 10, 1960, agents of the Alcohol and Tobacco Tax Division of the Internal Revenue Service went to the site of a large industrial complex in Jewett City, Connecticut, at which an illegal distilling operaton was reportedly being conducted. After entering the premises through a hole in a fence and proceeding down an alleyway, the agents detected the distinct odor of fermenting mash emanating from a building, known as 9A, which was located in the northwest corner of the site. They then departed by the same route they had come. Earlier that evening, another agent, posted on high ground overlooking the site and using binoculars, had scanned the interior of building 9A and seen a column still and other materials used in the distillation of alcohol (R. 124–125). The next day, on the basis of these observations, the federal agents obtained a search warrant for building 9A. Upon executing the warrant, they found a 753-gallon still in full operation, and 9 mash vats containing approximately 5,756 gallons of mash. Ad-

[1] The court affirmed the convictions of all four defendants on the conspiracy count and of Edward Romano and Antonio Vellucci on the substantive count in which they were named (count two); under the judge's charge, the presumptions were not applicable to respondents' co-defendants.

ditional paraphernalia used in the distillation process (*e.g.*, hundreds of glass jugs and numerous bags of sugar) were also discovered on the premises (R. 17–20, 30–33, 39–41; see R. 125). The respondents were found inside the building standing a few feet from the operating still (R. 64–65). In Ottiano's pocket, the agents found the keys to the doors of the building. Both men informed the agents that they did not know how long the still had been in operation, Romano adding that he had been at the premises for three days. Romano showed the agents how to turn off the still motor (R. 6–14, 29).

The trial judge instructed the jury, *inter alia*, that they were "the sole judges of the facts" (R. 91); that "[t]he law presumes a defendant to be innocent of crime" and that this presumption "alone is sufficient to acquit a defendant, unless the Jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case" (R. 92); that "the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged" (R. 93); and that, as to "any presumption that is referred to in the Court's charge, you will consider that presumption in the light of all of the evidence which has been offered in arriving at a conclusion, keeping always in mind that it is the burden of the Government to prove beyond a reasonable doubt the guilt of each accused" (R. 95). The trial court then instructed the jury as to the inferences established by 26 U.S.C. 5601(b) (1) and (4) (*supra*, pp. 2–3), indicating that they were limited to the first two substantive

counts and to the defendants (Frank Romano and John Ottiano) who were found at the illegal still by the arresting officers (R. 100–102).

In holding the statutory inferences unconstitutional the court of appeals relied upon the Fifth Circuit decision in *Barrett* v. *United States*, 322 F. 2d 292, which was subsequently reversed by this Court *sub nom. United States* v. *Gainey*, 380 U.S. 63. It found that each statutory inference "is too strained and is not reasonably related to the fact proved" (R. 129). The court concluded (R. 130):

> We find that the presumptions set out in §§ 5601(b) (1) and (4) fall outside the constitutional power of Congress. There is no broad ground of experience which supports the conclusion that people present at a still site are in possession or control of the distilling operation on that site in such a large proportion of such instances that a jury may be instructed that it may draw such a conclusion in the absence of any explanation.

ARGUMENT

INTRODUCTION AND SUMMARY

In *United States* v. *Gainey*, 380 U.S. 63, this Court, last Term, sustained the constitutionality of one of five statutory inferences (or "presumptions") added in 1958 to the alcohol tax laws. The provision[2] upheld in *Gainey* permits a jury to convict of the crime of carrying on the business of a distiller without bond[3] if it finds that the defendant was present at the place

[2] 26 U.S.C. 5601(b)(2).
[3] 26 U.S.C. 5601(a)(4).

where and the time when the business of a distiller was being carried on, and his presence is not satisfactorily explained. Also challenged in that case—as here—was a closely related statutory inference[4] which, in similar circumstances, authorizes conviction of possession, custody, or control of an unregistered set-up still.[5] The Court did not reach the constitutionality of the latter provision, however, since concurrent sentences had been imposed on the *Gainey* defendants. The same question is unavoidably presented in the instant case since the fines imposed on both respondents were based on illegal possession alone. This case further involves the constitutionality of another closely related provision[6] which permits guilt of the crime of unauthorized production of distilled spirits[7] to be inferred from the defendant's unexplained presence at the site of an illegal still when distilled spirits are being produced.

The constitutionality of the last-cited provision is established by the principles of the *Gainey* decision, which held that a statutory inference of guilt under

[4] 26 U.S.C. 5601(b)(1).

[5] 26 U.S.C. 5601(a)(1). A still is "set up" under the statute when, although some minor adjustment may be necessary, it is essentially capable of immediate operation. See *Guy* v. *United States*, 336 F. 2d 595 (C.A. 4); *United States* v. *Moses*, 205 F. 2d 358, 359 (C.A. 2); *Otto* v. *United States*, 29 F. 2d 504, 505 (C.A. 7); *United States* v. *Cafero*, 55 F. 2d 219, 220 (C.A. 2); *Colasurdo* v. *United States*, 22 F. 2d 934, 935 (C.A. 9). Unless a still is "set up" within these standards, the registration requirements of the statute do not apply. *Liverman* v. *United States*, 260 F. 2d 284, 286 (C.A. 4).

[6] 26 U.S.C. 5601(b)(4).

[7] 26 U.S.C. 5601(a)(8).

the alcohol tax laws based on the unexplained presence of the defendant is rational, and hence constitutional, if the offense is sufficiently broad as to encompass everyone to whom the inference is at all likely to be applicable. We show in Part I of our Argument that the offense of unauthorized production is as comprehensive as the offense of engaging in the business of a distiller without bond at those times when the illegal still is actually in operation, and that the statutory inference, which applies to unexplained presence at those times and no others, is therefore exactly comparable to and no less rational than the inference involved in *Gainey*. We urge, indeed, that there is even stronger reason to infer illegal production from unexplained presence when the still is running, than there is to infer engagement in the business of an unauthorized distiller from unexplained presence at an illegal still regardless of whether it is running when the defendant is found; strangers to the illegal enterprise are even less likely to be present during the actual runs when alcohol is being produced than during periods when the still is idle.

The constitutionality of the inference relating to the offense of unauthorized *possession* raises somewhat more difficult questions, in view of the ruling in *Bozza* v. *United States*, 330 U.S. 160, 163–164, which narrowly defines this offense. However, we argue in Point II that the 1958 amendments, which added the inferences here challenged and which we demonstrate were intended to overrule this Court's decision in *Bozza*, may fairly be read to have implicitly redefined the offense of unauthorized possession, broadening it

sufficiently so that the statutory inference relating to possession is constitutional under the principles of *Gainey*. We submit that such a construction, which is a reasonable interpretation of Congress' basic purpose, should be adopted by this Court to avoid the drastic step of annulling an Act of Congress.

Finally, in Part III we show that the trial judge's instructions to the jury were adequate under *Gainey*, and infringed no right of either respondent.

I

THE STATUTORY INFERENCE SET FORTH IN SECTION 5601 (b)(4) IS CLEARLY CONSTITUTIONAL UNDER THE PRINCIPLES ANNOUNCED IN THE *GAINEY* DECISION

In upholding the constitutionality of the statutory inference that permits conviction of carrying on the business of an unauthorized distiller to be based on the defendant's unexplained presence at the site where and the time when such business was being carried on, this Court, in *Gainey*, emphasized the breadth of the offense, describing the provision as "one of the most comprehensive of the criminal statutes designed to stop the production and sale of untaxed liquor." *United States* v. *Gainey*, 380 U.S. 63, 67. It is committed not only by the owner or operator of the illegal enterprise, but by suppliers, purchasers, haulers, and helpers of all kinds—by everyone, in fact, who is not a stranger to the enterprise. The likelihood that a stranger would be present at an illegal still is very remote, since "moonshiners," for obvious reasons of security, take the most elaborate precautions to keep strangers away from it. Therefore, the Court con-

cluded, the statutory inference gives the fact of unexplained presence at the site of an illegal still no more than its natural probative weight (380 U.S. at 71).

The statutory inference that we are concerned with here—which permits guilt of the offense of unauthorized production to be inferred from unexplained presence at the site of an illegal still when, but only when, alcohol is being produced—is constitutional under identical reasoning. The offense of unauthorized production—at least, during periods when the still is in actual operation producing alcohol—is no less comprehensive than that of carrying on the business of an unauthorized distiller.[8] The sole difference is that the offense of carrying on the business of an unauthorized distiller is committed both during runs and between runs, while the offense of unauthorized production is committed only during runs. During runs the latter offense encompasses just as many persons as the former: anyone who has any connection with the illegal enterprise while production is actually taking place is guilty of unauthorized production either as principal or accessory—purchasers, suppliers, haulers, watchmen, lookouts, etc.[9] Since the statutory in-

[8] The probable explanation of why Congress made carrying on and production separate offenses is that the former is intended to provide a criminal penalty for breach of 26 U.S.C. 5173, which requires a distiller to post a bond, and the latter a criminal penalty for breach of 26 U.S.C. 5171(b), which requires him to obtain an operating permit before distilling begins.

[9] See *DeGregorio* v. *United States*, 7 F. 2d 295, 296 (C.A. 2); *Occinto* v. *United States*, 54 F. 2d 351, 353 (C.A. 8); and *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C.A. 2), where

ference relating to the offense of unauthorized production is operative only with respect to persons present during runs,[10] and since it is at least as likely that a person found at the site of an illegal still during runs is guilty of unauthorized production as that a person found present between runs is guilty of carrying on the business of an unauthorized distiller, section 5601(b)(4) is no less rational than 5601(b)(2), upheld in the *Gainey* decision.

Its constitutionality, indeed, follows from that decision *a fortiori*. For whatever security measures may be taken between runs to keep away the innocent passerby are bound to be increased (*e.g.*, by the posting

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the courts implicitly so held on the facts, although finding it unnecessary to deal specifically with the issue. In *Bozza* v. *United States*, 330 U.S. 160, where the defendant was charged in count one with carrying on the business of making distilled spirits with intent to defraud the United States (see 155 F. 2d 592), the Court made no distinction between unauthorized production and unauthorized carrying on in upholding the conviction on count one. Evidence that the petitioner helped the operator work the still and manufacture the alcohol in addition to aiding him in the delivery of the finished product (330 U.S. at 163), which was held sufficient to support the conviction for carrying on the business, was also held sufficient to show unauthorized production. And the dissenting opinion, which considered the evidence insufficient to show intent to defraud, noted that proof of such intent was different from proof of "[a]iding and abetting in the illicit *manufacture* of liquor" (330 U.S. at 168; emphasis added).

[10] Presence at a set-up still, even though there is evidence of a going business, is not enough to trigger into operation the inference embodied in section 5601(b)(4); the still must be actually operating and liquor must be being produced for the inference to come into play. So in this case, it was only because petitioners were found in the building containing a 753-gallon still in *full operation* that the presumption was held to apply (see Statement, p. 4, *supra*).

of additional lookouts) when the still is actually running. It is at that time, when production is taking place and the distinctive odor of fermenting mash is perceptible (see Statement, p. 4, *supra*; R. 126), that testimony by observers could provide the most damaging evidence of guilt. The Court's observations in *Gainey*, "that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade," and "that strangers to the illegal business rarely penetrate the curtain of secrecy" (380 U.S. at 67–68), provide especially cogent support for a statutory inference from unexplained presence that does not come into play unless actual production—the heart of the business—is taking place.

II

THE STATUTORY INFERENCE SET FORTH IN SECTION 5601(b)(1) IS CONSTITUTIONAL IF, CONSISTENTLY WITH THE BASIC LEGISLATIVE PURPOSE, THE OFFENSE OF UNAUTHORIZED POSSESSION IS GIVEN A BROAD CONSTRUCTION

Count one of the indictment (R. 2) charged the defendants under section 5601(a)(1), which declares guilty of a criminal offense any person who—

> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered * * *.

Section 5601(b)(1) provides that proof that the defendant was "at the site or place where, and at the time when, a still or distilling apparatus was set up [11] without having been registered" shall be sufficient

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11 See note 5, *supra*.

evidence to authorize conviction unless the defendant's presence is explained to the satisfaction of the jury.

The basic plan of Congress in the alcohol tax laws is clear. It is to make criminal every meaningful form of participation in, or assistance to, the operation of an illegal still by an elaborate pattern of partially redundant provisions—some specific and some general—designed to close all loopholes. Thus, the owner or operator of an illegal still violates at least eleven criminal provisions.[12] In *Bozza* v. *United States*, 330 U.S. 160, 163–164, this Court, on the government's confession of error, gave the substantive offense of unauthorized possession a narrow construction. It held that while such an offense as carrying on the business of an unauthorized distiller embraced a broad class, the offense of possession could not be extended beyond those who had the actual "custody or possession" of the still or acted in some "other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman,

[12] Possessing an unregistered still (§ 5601(a)(1)); engaging in the business of a distiller without having applied for registration (§ 5601(a)(2)); carrying on the business of a distiller without having posted the required bond (§ 5601(a)(4)); making mash on premises other than a licensed "distilled spirits plant" (§ 5601(a)(7)); unauthorized production of distilled spirits (§ 5601(a)(8)); bottling spirits with knowledge that the tax due has not been paid (§ 5601(a)(11)); unauthorized removal of distilled spirits from the place of manufacture (§ 5601(a)(12)); carrying on the business of a distiller with intent to defraud the United States of the tax due (§ 5602); possessing, selling and transferring spirits in unstamped containers (§ 5604(a)(1)); engaging in distilling without displaying the required sign (§ 5681(a)); and possessing liquor and property used or intended for use in violation of the alcohol tax laws (§ 5686(a)).

lookout, or in some similar capacity.'" If *Bozza* is still authoritative on the definition of the offense, then an inference from the mere fact of presence at an illegal still that the defendant committed acts constituting this substantive crime may very well be too tenuous to satisfy the requirement of rational connection as defined in *Gainey*. Bozza himself, who was found on the premises of an operative still, was a workman aiding in the operation but neither having nor aiding possession or custody in the narrow sense that the Court deemed intended by the statute. To impose such an inference might also be thought to place an unjust burden upon the defendant, since to give the most likely explanation of presence consistent with innocence under section 5601(a)(1) he would have to admit his guilt of crimes under other provisions of the alcohol tax laws (see the government's brief in *Gainey*, No. 13, O.T. 1964, pp. 18, 22–26, 33).

We submit, however, that Congress in the 1958 amendments overruled the narrow definition given to "possession" in *Bozza* and redefined the substantive crime, broadening it to include within its scope all those present at a set-up still who have any connection with the illicit enterprise. But cf. *McFarland* v. *United States*, 273 F. 2d 417, 419 (C.A. 5).

It is true that in language and form the amendments added only the inference (section 5601(b)(1))

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[13] This was the First Circuit's view in holding the "possession" presumption (26 U.S.C. 5601(b)(1)) unconstitutional in *Pugliese* v. *United States*, 343 F. 2d 837. The government did not file a petition for a writ of certiorari in *Pugliese* because there was a substantial doubt whether the defendant in that case was actually "present" at the still within the intendment of section 5601(b)(1).

and left untouched the definition of the substantive offense (section 5601(a)(1)). But "possession" (and the other operative terms, "custody" and "control") are not defined in the statute. And their meaning must be derived not only from the words of section 5601(a)(1) but from its context and other evidence of congressional intent, for, as Judge Learned Hand observed, there "is no surer way to misread any document than to read it literally." *Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (C.A. 2) (concurring opinion). This Court has expressly held that a statutory provision "reenacted *in haec verba*" as part of a comprehensive legislative revision may "be deemed expanded in its new context * * *." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 346. The legislative history of the 1958 amendments to the alcohol tax laws is explicit that the provisions in suit here were "designed to avoid the effect of [this Court's] holding [in *Bozza* v. *United States*] as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess., p. 189; H. Rep. No. 481, 85th Cong., 1st Sess., p. 175.[14]

[14] These Reports relate to the many changes worked by the Excise Technical Changes Act of 1958 and focus only briefly on the new statutory presumptions added. In identical language borrowed from an analysis prepared by the Alcohol and Tobacco Tax Division of the Internal Revenue Service (see *Hearings Before a Subcommittee of the House Committee on Ways and Means on Excise Tax Technical and Administrative Problems*, Part I, 84th Cong., 1st Sess., p. 208; see also *Hearings*, *id.*, Part III, p. 95), the relevant portions of the House and Senate reports read:

"* * * These paragraphs are new. Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual

The only way this basic intent can be effectuated without raising very grave constitutional questions is to give "possession" an expanded reading in its new context, to embrace all those connected with the illegal enterprise.[16] This done, the constitutionality of the statutory inference of guilt of unauthorized possession from unexplained presence at a set-up unregistered still follows from *Gainey*.

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participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in *Bozza* v. *United States* (330 U.S. 160).

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

"In the *Bozza* case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute alone defines.' These new provisions are designed to avoid the effect of that holding as to future violations."

[16] A somewhat similar contention was rejected in *Tot* v. *United States*, 319 U.S., 463, 472, partly on the ground that it did not jibe with the legislative purpose. There, the government's argument was that, since Congress might have prohibited the possession of firearms by ex-felons, whether or not acquired in interstate commerce, there could be no objection to a mere presumption that the weapon was purchased from interstate commerce. Pointing out that this reasoning, in any event, did not support the presumption of acquisition after the effective date of the act, the Court added: "it is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition in interstate commerce." The critical difference here is that in the present instance congressional intent to broaden the offense is plain.

This construction does no violence to the language of the statute. The terms "possession," "custody" and "control" are broad enough to permit a construction under which all those connected with the business of an unauthorized distiller are guilty either as principals, aiders or abettors of the substantive crime of unauthorized possession, custody or control of a set-up still.[16] Nor is such a construction unreasonable because it results in partially overlapping prohibitions; that is, as we have seen, a characteristic of the criminal penalty provisions of the alcohol tax laws (see p. 13 and n. 12, *supra*). On the contrary, by adopting such a construction this Court, without annulling an Act of Congress, can give effect to Congress' overriding purpose in establishing this intricate structure of complementary [17] and sometimes overlapping criminal penalty provisions—to ensure that no one connected with the illegal enterprise escapes punishment by reason of a loophole in the law or the practical impossibility of proving all the elements of a particu-

[16] Cf. *United States* v. *Rappy*, 157 F. 2d 964, 966–967 (C.A. 2, L. Hand, J.), certiorari denied, 329 U.S. 806; *United States* v. *Santore*, 290 F. 2d 51, 76–78 (C.A. 2), certiorari denied, 365 U.S. 834. To establish guilt of aiding and abetting in the illegal possession of narcotics, "it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental." *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811.

[17] The purpose of making unauthorized possession a distinct separate offense is evidently to provide a criminal penalty for breach of 26 U.S.C. 5171(a) and 5179, which require a distiller to register his still. Compare n. 8, p. 10, *supra*. In view of Congress' intent

lar substantive offense. Nor can there by any real claim of surprise. Everyone knows (or is presumed to know) that involvement with an illicit still is a criminal offense. Adequate warning has been given. That the crime is now termed "possession" does not invalidate the notice.

III

THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY WERE ADEQUATE UNDER THE STANDARDS SET FORTH BY THIS COURT IN *GAINEY*

This Court in *Gainey*, in holding that the trial judge's instructions were not improper (see 380 U.S. at 69–70), noted that "[t]he jury was * * * specificially told that the statutory inference was not conclusive" (*id.* at 70). Here, too, the trial judge made clear that as to "any presumption that is referred to in the Court's charge, you will consider that presumption in the light of all of the evidence which has been offered in arriving at a conclusion, keeping always in mind that it is the burden of the Government to prove beyond a reasonable doubt the guilt of each accused" (R. 95, see Statement, p. 5, *supra*); he told the jury only that they "*may* consider" the statutory inferences (R. 100; emphasis added); and he gave far less emphasis to the statutory inferences

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to punish each step of the operation of an illegal distilling business separately, no problem is presented by cumulative penalties for committing more than one offense. Cf. *Gore* v. *United States*, 357 U.S. 386. We note also that the sentences imposed in the present case under both substantive counts were together less than the maximum punishment that could have been imposed under either count.

in his instructions than the trial judge in *Gainey*.[18] The instructions were adequate in all other respects as well.[19]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals setting aside respondents' convictions on counts 1 and 2 should be reversed.

RALPH S. SPRITZER,
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

AUGUST 1965.

[18] The only express references are at R. 100 and R. 102; see also R. 95. Compare 380 U.S. at 69–70.

[19] In *Gainey*, the Court held that the trial judge's reference to the defendant's failure to explain his presence satisfactorily was not, in the circumstances, a comment on petitioner's failure to testify. 380 U.S. at 70–71. Here it is even clearer that such reference was not intended or likely to be so understood, since the reference was made only in the course of the judge's reading to the jury the provisions of the statutory inferences.

U.S. GOVERNMENT PRINTING OFFICE: 1965

INDEX

CITATIONS

In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 2

UNITED STATES OF AMERICA,
Petitioner

vs.

FRANK ROMANO AND JOHN OTTIANO,
Respondents

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals is reported at 330 F.2d 566, and appears at pages 123-130 of the transcript of the Record.

JURISDICTION

The jurisdiction of this Court is based upon the provisions of 28 United States Code, Section 1254 (1). The Petition for a Writ of Certiorari was granted on March 15, 1965 (380 U.S. 941) *Cf.* (R-138).*

* References are to the Transcript filed by the Government.

QUESTION PRESENTED

Whether the presumptions established by Section 5601 (b) (1) and (4) of the Internal Revenue Code, as here applied, satisfy the requirements of the due process clause of the Fifth Amendment.

STATUTES INVOLVED

Section 5601 of the Internal Revenue Code of 1954 as added by 72 Stat. 1398-1400, 26 U.S.C. 5601 provides, in pertinent part as follows:

(a) OFFENSES:

Any person who —

(1) Unregistered stills

Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by 5179 (a); or

(8) Unlawful production of distilled spirits

Not being a distiller authorized by law to produce distilled spirits produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material . . .

(b) PRESUMPTIONS:

(1) Unregistered stills

Whenever on trial for violation of sub-section (a) (1) the defendant is shown to have been at the site or place where and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant

shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury . . .

(4) Unlawful production of Distilled Spirits

Whenever on trial for violation of sub-section (a) (8) the defendant is shown to have been at the site or place where, and at the time when such distilled spirits were produced by distillation or any other process from mash, wort, wash or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury . . .

STATEMENT

On October 10, 1960, Agents Mortimer Nadel and Samuel Sushman of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, together with Officer Donald Harris of the Connecticut State Police, went to the site of the "Aspinook Mill" in Jewett City, Connecticut. The purpose of this visit was to attempt to verify certain information concerning an alleged violation of the revenue laws taking place on the premises.

"Aspinook Mill" is a large complex of industrial buildings covering a number of acres of land. Parts of the complex had been and were occupied by tenants. There was an entrance to the property; and, beyond the entrance, two roadways were available for access to all of the buildings. One of these roadways ran along the river that bordered the property on the west. The other ran toward the railroad tracks that bordered the property on the east. The northerly side of the mill was bordered by the river and by a hydro-electric spillway. The entrance gate was on the southerly side of the property.

The three agents proceeded along the easterly boundary of the property with Officer Harris of the State Police acting as the guide. There was a fence along this part of the property and as the three agents walked along the outside of the fence they came upon an aperture through which they gained entry into the "Aspinook Mill" property.

The intelligence available to the federal agents indicated that there was an illegal distilling apparatus located in the extreme northwesterly corner of the industrial complex previously described. After gaining entry through the hole in the fence, the three agents then proceeded, under the cover of darkness, through a series of buildings until they were in the the so-called paint shop area. This scouting expedition took place between 10:30 and 11:00 p.m. At this point, from a concealed position in the buildings, the agents could detect the odor of fermenting mash. The building in which they detected the odor of fermenting mash was located in the extreme northwest corner of the complex and all of its windows had been covered with some substance that prevented light from showing on the outside at night.

Earlier, other agents of the Alcohol Tax group set up an observation position on high ground across the river from the "Mill" site. Apparently all of the windows were not covered because Agent Shaw, using a high powered set of binoculars, made observations of the interior of the building through what was apparently a single unpainted or uncovered pane of glass. From these observations, Agent Shaw made an affidavit that there appeared to be equipment in the building that could be used for distilling purposes. On the basis of the observations made through the binoculars and the entry on the "Mill" premises on the night of October 10, two agents, Shaw and Sushman, prepared affidavits that were the basis for the issuance of a search warrant for the northwest corner building. The war-

rant was issued and directed the agents to search and seize specific items forthwith.

On October 13, 1960, at 7:30 a.m. a group of agents and officers of the Connecticut State Police went to the "Aspinook Mill" and entered the described premises. On the premises they found the defendant, Frank Romano, and the defendant, John Ottiano. They also found a large capacity still. The evidence indicated the still had been in operation for about three days. Ottiano had arrived at the premises in a pick-up truck about twenty minutes before the Federal agents broke into building 9A.

During the trial, it developed that the Government agents had found a large distilling apparatus on the premises. The Government offered evidence which showed that there were certain glass jars of a type distributed by a Connecticut representative of the Knox Glass Company found on the premises. The president of the distributor testified that he had sold jugs of this type to two men whom he identified as Frank Romano and Edward Romano. (R. 67-68) The witness also testified that they were operating a Ford pick-up with a rack body of the same type and year as that found on the still premises on the morning of the raid. Another witness testified that he was directed by his employer to deliver some truck loads of sugar to a location outside of Providence, Rhode Island. The person who met him drove away with the truck and returned about an hour and a half later with the truck empty. The time just to travel from Providence to Jewett City and back was estimated well in excess of this time. The type of sugar was 60 lb. bags of Domino Brand sugar. Neither of the government witnesses was able to state with certainty that the glass jugs or the empty or full sugar bags found in Jewett City were the same as those sold some time earlier. On the "still premises" the Government produced photographs of a commode and a

shield, apparently of plywood, segregating the lavatory from the rest of the premises.

Later, the Government produced a witness who indicated that at some indeterminate date in September, 1960, he saw the defendant, Ottiano, and the defendant, Edward Romano, in a building on the extreme southerly part of the industrial complex. The witness stated that these two men were looking for a piece of plywood and the commode. The witness stated that he called Providence to obtain permission to let them take it.

Edward Romano was the only defendant that took the stand and he denied having been in Jewett City, Connecticut, or at the "Aspinook Mill" at any time before October 13, 1960.

Thereafter, the Court made its charge on the elements of the offenses charged and the presumptions in Count One (R. 98-100) Count Two (R. 101-102) and Count Three (R. 103-109). The trial court never indicated that the presumptions were limited to Counts One and Two or to the defendants, Frank Romano and John Ottiano only. The Second Circuit reversed the convictions of Frank Romano and John Ottiano on Counts One and Two and affirmed the convictions of the other two defendants on Count Two and all defendants on Count Three, somehow concluding that the Court clearly distinguished between defendants in Count Two and made it clear that no presumptions applied to Count Three, this in the light of a specific exception taken by the defense. (R. 116, 118)

After the trial commenced, one defendant changed his plea, and another defendant was discharged by the Court at the conclusion of the case for the prosecution. The trial started on May 1, 1962, and ended on May 31, 1962.

Frank Romano and John Ottiano were found guilty of possession, custody and control of an unregistered still in Count One, all defendants were found guilty of production of distilled spirits in Count Two and conspiracy to produce distilled spirits in Count Three.

In the charge, the Court told the jury it was duty bound to follow the law as stated. (R. 91) In the beginning of the charge the Court charged on the presumption of innocense. (R. 92-93) In addition, the Court told the jury that evidence included admitted and stipulated facts, facts judicially noticed, and presumptions (R. 94) which "continues in effect until overcome or outweighed, but unless so outweighed the jury are bound to find in accordance with the presumption." (R. 95)

ARGUMENT

I.

The Statutory Inference Set Forth In 5601(b)(1) Violates The Fifth Amendment

There has been a decision in March, 1965, by this Court that tends to indicate that this statutory presumption should be declared constitutional, *United States* vs. *Gainey*, 380 U.S. 63 (1965). While *Gainey* does hold the statutory presumption constitutional, it does so by pointing out that as the presumption was used in the Court's charge in the middle district of Georgia, it was merely tantamount to an expression of existing rules of evidence. This case is fundamentally different in that regard.

The Government contends that it was the intent of Congress, in enacting the provisions of Section 5601 in 1958, to overrule the conclusions of this Court in *Bozza* vs. *United States*, 330 U.S. 160. In *Bozza*, this Court said that to establish the ele-

ments of "custody, possession, or control" there must be some affirmative evidence of activity tending to establish that conclusion. A lessee, rentor, caretaker, watchman, or lookout status, established by the evidence, might suffice. At the same time in *Bozza* the Court said actual participation in the production was not enough. The issue was not redefined in 5601(a)-(1) since the same words are used. The only function of the presumption, therefore, is to afford the opportunity to convict when your evidence is devoid of probative value to establish custody, possession or control.

Regardless of the circumstances of one's presence, presence alone being sufficient to convict, the prosecution's task under 5601(a)(1) is complete by showing:

1. A still or distilling apparatus set up.
2. No registration.
3. Presence of the Defendant.

At this stage, should the accused elect not to "explain such presence to the satisfaction of the jury" by taking the stand, the presumption would impose upon the accused a substantial danger. At the same time, it gives to the Government a simple conviction technique devoid of any danger at all. What, in this example, is the rational connection between the facts proved and the ultimate facts presumed?

Tot vs. *United States*, 319 U.S. 463 at 466.

What is the rational connection between presence and guilt? "It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him . . . The (Fifth Amendment) in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure

of the defendant . . . to be a witness shall not create any presumption against him."

Cf. Griffin vs. *California*, 380 U.S. 609;
Wilson vs. *United States*, 149 U.S. 60 at 66.

Is it not equally conceivable that a man could go to a place that he knows to be a distillery without any knowledge about the failure to have it registered in accordance with the law? Rather than meet the rational connection test established in *Tot* vs. *United States, supra*, this presumption permits the most irrational connection to the ultimate fact presumed. *Ibid.*

Finally, since section 5601(a) defines a number of offenses, by taking the stand to try to persuade the jury, an accused may find himself faced with the practical effect of giving testimony that will surely convict him of one of the alternatives available for prosecution. If this Court gives this presumption the broad definition that the Government urges, it will have effectively shifted the burden to the defendant to prove himself innocent.

II.

THE STATUTORY INFERENCE SET FORTH IN 5601(b)(4) IS VIOLATIVE OF FUNDAMENTAL FIFTH AMENDMENT GUARANTEES.

Section 5601(b)(4) permits the following evidence, and no other, to be produced to establish a prima facie case:

(a) No record of the defendant being an authorized distiller.

(b) Production of distilled spirits.

(c) Physical presence, when and where the spirits are being produced, of the defendant.

At this point, the prosecutor, with the aid of the presumption, will have established a prima facie case. He may rest. In the charge, the trial court must charge the jury under 5601(b)(4). The Court would, therefore, be permitted to charge:

> "Any person who not being a distiller authorized by law to produce distilled spirits by distillation or any other process violates 26 United States Code Section 5601(a)(8). Distilled spirits include ethanol, ethyl alcohol, spirits of wine and include brandy, whiskey, rum, gin and vodka. A distiller is a person who produces distilled spirits from any source or substance.
>
> "Was the building in which the still or distillation apparatus set up legally registered with the Secretary of the Treasury?
>
> "If you find that the defendant was present at a time when and a place where there was being produced distilled spirits unless the defendant explains, to your satisfaction, his presence, the law imposes upon the defendant a presumption that his presence is sufficient to authorize his conviction.
>
> "Evidence includes all facts which have been admitted or stipulated, all facts and events judicially noticed, and all presumptions stated in these instructions."

It is not so important to point out that these precise words were used in a much more lengthy charge in this case. What is important is that except for a paragraph about reasonable doubt, a few more sentences defining what a distiller is and an instruction that the verdict must be unanimous, this charge could be correct if the *Gainey* case *supra* is dispositive of the issue. The example is plainly a "reductio ad absurdum" analogy. Does it, however, violate the test of *Wilson* vs. *United States,* 149 U.S. 60? Does 5601(b)(4), insofar as that pre-

sumption may be used in still cases, repeal 18 U.S.C., Section 3481? If an accused declines to explain his presence, is that, with all of the majesty and dignity accorded the bench by the twelve laymen in the box, an alternative method of reverting to "the inquisitorial system of criminal justice", *Murphy* vs. *Waterfront Commission of New York Harbor,* 378 U.S. 52 at 55.

If we were to paraphrase the language of *Malloy* vs. *Hogan,* 378 U.S. 1, it would read:

> "It would be 'incongruous' to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was (based upon an alcohol tax provision of the United States Code, or some other federal criminal violation) . . . the same standard must determine whether an accused silence is justified."
>
> *Ibid* at 11.

This Court has condemned the practice of comment, in *Griffin* vs. *California,* 380 U.S. 609, noting in footnote 3 at page 612 that Connecticut permits comment by the judge. In deciding *Griffin* this Court said comment on the failure of an accused to testify violates the Fifth Amendment. Is a charge such as made here under 5601(b)(4) less than comment?

III.

The Charge Was Constitutionally Inadequate Even If The Gainey Standard Is Adopted.

In the *Gainey* case, *supra,* at page 70, this Court observed that the trial court pointed out, precisely, when making the charge upon the statutory presumption, that the presumption was not mandatory. The trial court in this case made no such observation when charging on Count I. (*Cf.* R. 100) In

Count II similarly, there is no language of explanation that the presumption was not mandatory. (R. 102) In fact, by inference, the presumption attached to an aider and abettor since the definition of aiding and abetting followed immediately the charge under 5601(b)(4). Thus, the presence of A — the agent or associate of B, is presumptive of the guilt of A & B. The charge is absolutely devoid of any clarifying or distinguishing language. If *Gainey* is to be the rule, therefore, the charge must meet the test established by the charge in *Gainey*. This charge does not.

CONCLUSION

For the reasons stated, the convictions were tainted by reason of the violation of the guarantees afforded by the Fifth Amendment to all the accused.

W. PAUL FLYNN,
Counsel for the Respondents

September 23, 1965

CERTIFICATION

This is to certify that five copies of the foregoing Brief were mailed to the United States Attorney for the District of Connecticut, and five copies of the foregoing brief were mailed to the Solicitor General of the United States.

W. PAUL FLYNN,
Counsel.

SUPREME COURT OF THE UNITED STATES

No. 2.—October Term, 1965.

United States, Petitioner, v. Frank Romano et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 22, 1965.]

Mr. Justice White delivered the opinion of the Court.

Federal officers, armed with a search warrant, entered one of the buildings in an industrial complex in Jewett City, Connecticut. There they found respondents standing a few feet from an operating still. Respondents [1] were indicted in three counts: Count 1 charged possession, custody and control of an illegal still in violation of 26 U. S. C. § 5601 (a)(1); [2] Count 2, the illegal production of distilled spirits in violation of 26 U. S. C. § 5601 (a)(8); [3] and Count 3, a conspiracy to produce distilled spirits. Both respondents were convicted on all three counts, both were fined on Count 1 and both sentenced to concurrent terms of imprisonment on each of the three counts.

The Court of Appeals affirmed the convictions on Count 3. 330 F. 2d 566. It reversed the convictions on

[1] Respondents were indicted with two others whose convictions are not in issue here.

[2] Section 5601 (a)(1) provides that any person who "has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both . . . ."

[3] Section 5601 (a)(8) provides that any person who, "not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both . . . ."

Counts 1 and 2 because the trial court in instructing the jury read verbatim provisions of § 5601 (b)(1)[4] and § 5601 (b)(4),[5] which provide in part that the presence of the defendant at the site of an illegal still "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury . . . ." This instruction and the statutory inference which it embodied were held by the Court of Appeals to violate the Due Process Clause of the Fifth Amendment. We granted certiorari to consider this constitutional issue. 380 U. S. 941.

We agree as to the invalidity of § 5601 (b)(1) and the reversal of the convictions on Count 1. It is unnecessary, however, to consider the validity of § 5601 (b)(4) and the convictions on Count 2 since the sentences on that count were concurrent with the sentences which were imposed on Count 3 and not challenged here. *United States* v. *Gainey*, 380 U. S. 63, 65; *Sinclair* v. *United States*, 279 U. S. 263, 299.

If we were reviewing only the sufficiency of the evidence to support the verdict on Count 1, that conviction would be sustained. There was, as the Court of Appeals

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[4] Section 5601 (b)(1) of 26 U. S. C. provides: "Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

[5] Section 5601 (b)(4) of 26 U. S. C. provides: "Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, or other materials, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

recognized, ample evidence in addition to presence at the still to support the charge of possession of an illegal still. But here, in addition to a standard instruction on reasonable doubt, the jury was told that the defendants' presence at the still "shall be deemed sufficient evidence to authorize conviction." This latter instruction may have been given considerable weight by the jury; the jury may have disbelieved or disregarded the other evidence of possession and convicted these defendants on the evidence of presence alone. We thus agree with the Court of Appeals that the validity of the statutory inference in the disputed instruction must be faced and decided.

The test to be applied to the kind of statutory inference involved in this criminal case is not in dispute. In *Tot* v. *United States*, 319 U. S. 463, the Court, relying on a line of cases dating from 1910,[6] reaffirmed the limits which the Fifth and Fourteenth Amendments place "upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the ultimate fact on which guilt is predicated." *Id.*, at 467. Such a legislative determination would not be sustained if there "was no rational connection between the fact proved and the fact presumed, if the inference of one from proof of the other is arbitrary because of the lack of connection between the two in common experience. . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." *Id.*, at 467–468. Judged by this standard, the statutory

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[6] *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35; *Bailey* v. *Alabama*, 219 U. S. 219; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *McFarland* v. *American Sugar Rfg. Co.*, 241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639; *Morrison v. California*, 291 U. S. 82.

presumption in issue there was found constitutionally infirm.

Just last Term, in *Gainey* v. *United States*, 380 U. S. 63, the Court passed upon the validity of a companion section to § 5601 (b)(1) of the Internal Revenue Code. The constitutionality of the legislation was held to depend upon the "rationality of the connection between the fact proved and the ultimate fact presumed." Tested by this rule, the Court sustained the provision of § 5601 (b)(2) declaring presence at a still to be sufficient evidence to authorize conviction for carrying on the business of the distillery without giving the required bond. Noting that almost anyone at the site of a secret still could reasonably be said to be carrying on the business or aiding and abetting it and that Congress had accorded the evidence of presence only its "natural probative force," the Court sustained the presumption.

This case is markedly different from *Gainey*, *supra*. Congress has chosen in the relevant provisions of the Internal Revenue Code to focus upon various phases and aspects of the distilling business and to make each of them a separate crime. Count 1 of this indictment charges "possession, custody and . . . control" of an illegal still as a separate, distinct offense. Section 5601 (a)(1) obviously has a much narrower coverage than has § 5601 (a)(4) with its sweeping prohibition of carrying on a distilling business.

In *Bozza* v. *United States*, 330 U. S. 160, the Court squarely held, and the United States conceded, that presence alone was insufficient evidence to convict of the specific offense proscribed by § 5601 (a)(1), absent some evidence that the defendant engaged in conduct directly related to the crime of possession, custody or control. That offense was confined to those who had "custody or possession" of the still or acted in some "other capacity calculated to facilitate the custody or

possession, such as, for illustration, service as a caretaker, watchman, lookout or in some other capacity." *Id.*, at 164. This requirement was not satisfied in the *Bozza* case either by the evidence showing participation in the distilling operations or by the fact that the defendant helped to carry the finished product to delivery vehicles. These facts, and certainly mere presence at the still, were insufficient proof that "petitioner ever exercised or aided in the exercise or any control over the distillery." *Ibid.*

Presence at an operating still is sufficient evidence to prove the charge of "carrying on" because anyone present at the site is very probably connected with the illegal enterprise. Whatever his job may be, he is at the very least aiding and abetting the substantive crime of carrying on the illegal distilling business. Section 5601 (a)(1), however, proscribes possession, custody or control. This is only one of the various aspects of the total undertaking, many of which have nothing at all to do with possession, as *Bozza* made quite clear and as the United States conceded in that case. Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—"the inference of the one from proof of the other is arbitrary . . . ." *Tot* v. *United States*, 319 U. S. 463, 467.

The United States has presented no cases in the courts which have sustained a conviction for possession based

solely on the evidence of presence. All of the cases which deal with this issue and with which we are familiar have held presence alone, unilluminated by other facts, to be insufficient proof of possession.[7] Moreover, the Government apparently concedes in this case that except for the circumstances surrounding the adoption of the 1958 amendments to the Internal Revenue Code, which added the presumptions relating to illegal distilling operations, the crime of possession could not validly be inferred from mere presence at the still site.[8]

According to the Government, however, the 1958 amendments were, among other things, designed to overrule *Bozza* and must be viewed as broadening the substantive crime of possession to include all those present at a set-up still who have any connection with the illicit enterprise.[9] So broadened, it is argued, the substantive

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[7] *E. g.*, *Pugliese* v. *United States*, 343 F. 2d 837 (C. A. 1st Cir., 1965); *Barrett* v. *United States*, 322 F. 2d 292 (C. A. 5th Cir., 1963), rev'd on other grounds, *sub nom. United States* v. *Gainey*, 380 U. S. 63; *McFarland* v. *United States*, 273 F. 2d 417 (C. A. 5th Cir., 1960) (dictum); *Vick* v. *United States*, 216 F. 2d 228 (C. A. 5th Cir., 1954); *United States* v. *De Vito*, 68 F. 2d 837 (C. A. 2d Cir., 1934); *Graceffo* v. *United States*, 46 F. 2d 852 (C. A. 3d Cir., 1931).

[8] Brief for petitioner, p. 14. See also brief for petitioner, p. 33, *United States* v. *Gainey*, 380 U. S. 63; *Bozza* v. *United States*, 330 U. S. 160, 164.

[9] The relevant Senate and House Reports discussing the presumptions added by § 5601 (b) are in identical language, which was borrowed from an analysis prepared by the Alcohol and Tobacco Tax Division of the Internal Revenue Service (see Hearings before a Subcommittee of the House Committee on Ways and Means on Excise Tax Technical and Administrative Problems, Part I, 84th Cong., 1st Sess., p. 208):

"These paragraphs are new. Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal

crime of "possessing," under the teachings of *Gainey*, could be acceptably proved by showing presence alone.

We are not persuaded by this argument, primarily because the amendments did not change a word of § 5601 (a)(1), which defines the substantive crime. Possession, custody or control remains the crime which the Government must prove. The amendments, insofar as relevant here, simply added § 5601 (b)(1) and permitted an inference of possession from the fact of presence. Moreover, the inference was not irrebuttable. It was allowable only if the defendant failed to explain his presence to the satisfaction of the jury. Plainly, it seems to us, the defendant would be exonerated if he satisfactorily explained or the circumstances showed that his function at the still was not in furtherance of the specific crime of possession, custody or control. If a defendant is charged with possession and it is unmistakably shown that delivery, for example, was his sole duty, it would seem very odd under the present formulation of the Code to hold that his explanation had merely proved his guilt of "possessing" by showing some connection with the illegal business.

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activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in *Bozza* v. *United States* (330 U. S. 160).

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

"In the *Bozza* case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute alone defines.' These new provisions are designed to avoid the effect of that holding as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess., pp. 188–189; H. R. Rep. No. 481, 85th Cong., 1st Sess., p. 175.

The Government's position would equate "possessing" with "carrying on." We are not convinced that the amendments to the Code included in the Excise Technical Changes Act of 1958 were intended to work any such substantive change in the basic scheme of the Act, which was, in the words of the Government's brief in this Court, "to make criminal every meaningful form of participation in, or assistance to, the operation of an illegal still by an elaborate pattern of sharply redundant provisions—some specific and some vague—designed to close all loopholes." Possession, custody or control was one of the specific crimes defined in the Code and we do not think that the 1958 amendments worked any change in this regard.[10] On the legislative record before us, we reject the Government's expansive reading of the 1958 amendments.

Congress may have intended by the 1958 amendments to avoid the *Bozza* case. But it chose to do so, not by changing the definition of the substantive crime, but by declaring presence to be sufficient evidence to prove the crime of possession beyond reasonable doubt. This approach obviously fails under the standards traditionally applied to such legislation. It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power.[11] The crime

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[10] In reference to the re-enactment of § 5601 (a)(1), the provision that defines the substantive offense, the Reports merely say, "This paragraph is a restatement of existing law. . . ." S. Rep. No. 2090, 85th Cong., 2d Sess., p. 186; H. R. Rep. No. 481, 85th Cong., 1st Sess., p. 173.

[11] The Government advanced a somewhat similar contention in *Tot*. It was rejected, partly on the ground that it was not supported by legislative history. *Tot* v. *United States*, 319 U. S. 463, 472. Cf. *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218.

remains possession, not presence, and, with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter.

Affirmed.

MR. JUSTICE BLACK concurs in the reversal of this conviction for the reasons stated in his dissent against affirmance of the conviction in *United States* v. *Gainey*, 380 U. S. 63, 74.

MR. JUSTICE DOUGLAS concurs in the result for the reasons stated in his opinion in *United States* v. *Gainey*, 380 U. S. 63, 71–74.

MR. JUSTICE FORTAS concurs in the result.